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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., APPELLANTS,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

UNITED STATES RAILWAY ASSOCIATION, APPELLANT,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. MCARTHUR, AS TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, APPELLANTS,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

RICHARD JOYCE SMITH, AS TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, DEBTOR, APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

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These cases are before the Court on appeal from a judgment of a three-judge district court sitting in the Eastern District of Pennsylvania entered on June 25, 1974.

That court held unconstitutional certain provisions of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§ 701-793 (the Act).

JURISDICTION

The judgment of the three-judge court in the Eastern District of Pennsylvania, convened pursuant to 28 U.S.C. §§ 2282 and 2284, was entered on June 25, 1974 (Joint Appendix (J.A.), pp. 82-83). On July 2, 1974, the Penn Central Trustees filed in the District Court a notice of appeal to this Court (J.A. p. 384). Timely notices of appeal were also filed by the other appellants (J.A. pp. 385-90). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1252 and 1253. Probable jurisdiction has not yet been noted; appellants' briefs are being lodged with the clerk prior to the noting of probable jurisdiction pursuant to a motion by all parties to advance causes for argument, filed in this Court on August 23, 1974.

OPINIONS BELOW

The opinion of Circuit Judge Aldisert for the three-judge court is printed at J.A. pp. 9-54, and a separate opinion of District Judge Fullam is printed at J.A. pp. 55-81; the order of the three-judge court is printed at J.A. pp. 82-83. These opinions and order have not yet been reported.

QUESTIONS PRESENTED

1. Did the court below properly conclude that appellant Trustees could not maintain an action in the Court of Claims to recover any amount due the estate for fair and just compensation for (a) the rail properties the estate would be required to convey to Consolidated Rail Corporation, and (b) any erosion of the Penn Central estate beyond constitutional limits?

2. Did the court below properly conclude that, because the Act does not provide just compensation for erosion of the Penn Central estate beyond constitutional limits, Section 303 of the Act, relating to the valuation of the Penn Central rail properties; Section 304(f) of the Act, requiring continued rail operation by Penn Central; and Section 209(c), authorizing the certification of the final system plan to the Special Court, offend the Fifth Amendment and are unconstitutional absent a remedy against the United States in the Court of Claims?

3. Did the majority of the court below properly decline to decide whether the Act is unconstitutional, absent a Court of Claims remedy, in that it requires transfer of Penn Central's rail properties to Consolidated Rail Corporation without the assurance of compensation which would satisfy the requirements of the Fifth Amendment?

4. If the court below was in error in declining to reach that question, or if the issue is otherwise now ripe for decision, is there adequate assurance that the consideration specified in the Act to be paid to the Penn Central estate for such rail properties will satisfy Fifth Amendment requirements?

5. If a Court of Claims remedy exists, does it save the constitutionality of the Act?

STATUTES INVOLVED

Article I, Section 8, Clause 4 of the Constitution, the Fifth Amendment to the Constitution, and the Tucker Act (28 U.S.C. § 1491) are set forth in the Appendix to this brief. The Regional Rail Reorganization Act of 1973, P.L. 93-236, 45 U.S.C. §§ 701-793, is printed at J.A. pp. 391 *et seq.*

STATEMENT

These actions challenge the constitutional validity of various provisions of the Regional Rail Reorganization Act of 1973 (45 U.S.C. §§ 701-793) (the Act), which was signed by the President on January 2, 1974.

Regional Rail Reorganization Act

The Act represents an attempt by the Congress to deal with the problems presented by the fact that a number of major railroads in the Northeast and Midwest are in reorganization pursuant to Section 77 of the Bankruptcy Act. In general, the Act creates a new Government corporation, the United States Railway Association (USRA); charges it with responsibility, subject to Congressional approval, to design a "final system plan" for restructured rail freight service in the Northeast and Midwest regions; creates a new private corporation, Consolidated Rail Corporation (Conrail), to acquire, own and operate the rail properties designated in the final system plan; and, subject to certain preliminary findings required by Section 207(b) of the Act, requires the railroads in reorganization to convey to Conrail such of their rail properties as are designated in the final system plan in return for certain securities and other consideration specified in the statute.

Section 207(b) of the Act requires each reorganization court to make certain decisions which ultimately determine whether the railroad in reorganization under its jurisdiction will be made subject to the compulsory-conveyance provisions of the Act. First, each reorganization court is directed to determine, within 120 days of January 2, 1974 (the 120-day hearing), whether the railroad in reorganization can be reorganized on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and whether the public interest would be better served by such reorganization than by reorganization under the Act. If both determinations are affirmative, that railroad ceases to be a railroad in reorganization within the meaning of the Act, is no longer subject to the compulsory-conveyance and other mandatory provisions of the Act, and continues its reorganization efforts under Section 77.

Second, if the railroad has not been excluded from the Act as a result of the 120-day hearing, each reorganization court is required by Section 207(b) to find, within 180 days of January 2, 1974 (the 180-day hearing), whether the Act provides "a process which would be fair and equitable to the estate of the railroad in reorganization." If the court finds that it would not, again the railroad ceases to be a railroad in reorganization within the meaning of the Act and is no longer subject to the compulsory-conveyance and other mandatory provisions of the Act. In that event, Section 207(b) directs the reorganization court to dismiss the reorganization proceedings. The decisions of the reorganization courts are reviewable, under Section 207(b), in the "Special Court" — a district court of three judges created pursuant to Section 209(b) of the Act. Section 207(b) provides that there shall be no review of such decisions of the Special Court.

Penn Central Proceeding

These actions relate to the application of the Act to the estate of Penn Central Transportation Company, Debtor, in reorganization under Section 77 of the Bankruptcy Act (Penn Central). The 120-day decision by the Reorganization Court on May 2, 1974 found that Penn Central was not reorganizable on an income basis within a reasonable time. The opinion and order of the Reorganization Court appear at J.A. pp. 84-103.

The 180-day hearing held with respect to Penn Central resulted in a finding by the Reorganization Court that the process of the Act was not fair and equitable to the Penn Central estate. The opinion and order of the Reorganization Court on this issue appear at J.A. pp. 124-52. That decision has been appealed by the Government parties and others to the Special Court.[1] The appeals will be argued before the Special Court on August 27 and 28, 1974. Under Section 207(b) of the Act, the Special Court is required to announce its decision by September 29, 1974.

The issues argued before the Reorganization Court, and now before the Special Court, are essentially the same constitutional questions which these actions present to this Court for decision.

Constitutional Litigation

Shortly after the Act became law, the first of these actions was filed (J.A. p. 161). The complaint alleged, *inter alia*, that the Act worked a permanent taking of the property of the Penn Central estate without assurance that the payment of just compensation required by the Fifth Amendment would be made; that the Act contravened the Fifth Amendment in failing to provide compensation for the erosion of the Debtor's estate during the interval between the enactment of the Act and the ultimate conveyance of rail properties to Conrail, during which period the Act required the railroad to continue operations; and that the

[1]Jurisdiction of the Reorganization Court to make the 120-day and 180-day decisions has been challenged by the Trustee of the New Haven Railroad, a creditor and stockholder of Penn Central. Appeals by the New Haven Trustee from both decisions are now pending before both the Special Court and the Court of Appeals for the Third Circuit.

Act violated the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution. Similar allegations were made in the other two complaints (J.A. pp. 261, 341). Appellant Trustees intervened as parties defendant in each of the three actions (J.A. pp. 191, 309, 358).

On June 3, 1974, the cases were submitted to the court below on cross-motions for summary judgment. The defendants, including appellant Trustees, asserted that there could be no deficiencies in just compensation as plaintiffs alleged, because the estate in reorganization would in any event be made whole by way of suit in the Court of Claims, both for any deficiency in the compensation received from Conrail for rail properties and for any claims they might have if it were determined that an unconstitutional erosion of the estate had taken place or would take place prior to the date of the mandatory conveyance. Defendants also denied that the act violated the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution.

On June 25, 1974, the court below filed an opinion and entered an order enjoining and holding null and void three provisions of the Act (J.A. pp. 9-83). All of the judges agreed that the Act was unconstitutional in failing to provide compensation for interim erosion which would be suffered by the Penn Central estate during the planning period, and that an action against the United States in the Court of Claims was not available to remedy this deficiency. On that basis the court enjoined enforcement of, and declared null and void, Section 304(f) of the Act, which requires continued rail operations during the planning period, and declared Section 303 of the Act null and void insofar as it fails to provide compensation for interim erosion. Because of these conclusions, the court enjoined USRA from certifying a final system plan to the Special Court pursuant to Section 209(c) (J.A. p. 82). A majority of the court also held Section 207(b) of the Act null and void

so far as it mandated dismissal of the Section 77 proceeding if reorganization under the Act is foreclosed.

The court also concluded that the questions whether the mandatory conveyance of rail properties to Conrail pursuant to the Act would violate Fifth Amendment rights, and whether a suit in the Court of Claims would be available to remedy any deficiency in this respect, were premature, since the 180-day decision as to Penn Central had not yet been made, the final system plan had not yet been approved by Congress, and the conveyance would have to be ordered by the Special Court (J.A. pp. 23-25). Judge Fullam, in his concurring opinion, believed that these issues were ripe for decision.

SUMMARY OF ARGUMENT

I.

If the consideration paid pursuant to the Act for the mandatory conveyance of Penn Central's properties proves constitutionally inadequate, or if interim erosion passes the point of constitutional permissibility and therefore involves a taking of property even apart from the ultimate mandatory conveyance, then the Trustees would have a remedy in the Court of Claims for just compensation. The Tucker Act, which provides that remedy, clearly applies. The text of the present Act — although containing thirteen provisions repealing various types of federal-court jurisdiction and excluding application of other federal laws — contains nothing which repealed the Court of Claims' jurisdiction under the Tucker Act for a taking or otherwise precluded a remedy there.

Nor can any implied repeal of the Tucker Act be found in the Act — especially when to find such an implied repeal

would require holding the Act unconstitutional. The Court will, of course, make every effort to construe an act of Congress in a way that makes it onstitutional rather than unconstitutional.

The legislative history shows no intent to exclude a Tucker Act remedy in the event hat the Act resulted in a taking of property. Congress inded attempted to structure the Act so that it would be held ot to involve any taking, and at least some Congressmen thought that it had succeeded in that attempt. But on tat question the intent of Congress is irrelevant: it is for th courts, not Congress, to determine whether or not govermental actions expressly directed by Congress amount toa taking of property for which just compensation is de. Congress specifically recognized that the consideraton for Penn Central's properties would be subject to a "constitutional minimum." And the fact that Congress has not yet appropriated funds to pay a Court f Claims judgment is no ground for holding that the At excluded Tucker Act jurisdiction; the same situation habitually applies with respect to Court of Claims litigatio.

II.

The court below was correct in its holding that, absent a Tucker Act remedy, the Act is unconstitutional in requiring continuing erosion of ne Penn Central estate, for an indefinite period, without any provision for compensating Penn Central's owners for the taking of property suffered thereby. Such erosion has already been massive — in the hundreds of millions of dollars — and no one can guarantee that if Penn Central is irrevocably subjected to reorgaization under the Act, erosion has not already pased or will pass the point at which it becomes un-

constitutional. Indeed there is a distinct likelihood that that point has already been passed.

The applicable case law, including the recent precedents established in the *New Haven* reorganization, establishes that deficit rail operations may not constitutionally be required without, at least, the assurance of successful and prompt reorganization. Since a decision to make Penn Central subject to the Act is irrevocable, the process of the Act cannot be allowed to go forward without an assurance that, if erosion passes the point of unconstitutionality, the estate will be compensated therefor. The Act itself provides no assurance either of a successful and prompt reorganization or of any compensation for erosion. Hence, if there is no Tucker Act remedy, the Act cannot be sustained.

III.

The majority of the court below erred in its holding that it is premature to decide whether the Act is constitutionally defective, absent a Tucker Act remedy, in failing to assure just compensation for the taking of property caused by a mandatory conveyance of Penn Central property to Conrail pursuant to a final system plan. The majority believed that issue was premature because a mandatory conveyance was subject to three contingencies: (1) a "180-day" decision making Penn Central subject to the process of the Act; (2) Congressional approval of a final system plan; and (3) an order of the Special Court directing the mandatory conveyance. None of these "contingencies" affects the reality that, unless the Act is at this stage found defective, the mandatory conveyance will in fact take place, and there will be no future opportunity to challenge either its constitutionality or its fairness and equity.

(1) The 180-day decision has now been made. While the Reorganization Court refused to subject Penn Central to the process of the Act, it did so essentially by deciding the same constitutional questions now before this Court, holding, *inter alia*, that the Act fails to assure just compensation for the mandatory conveyance of Penn Central property to Conrail. These questions are now before the Special Court, which like the Reorganization Court will doubtless base its holding on essentially constitutional grounds, and which will presumably structure its order to permit modification in the light of what this Court decides. Since there is no appeal from the Special Court's decision, the present cases are the only opportunity for an authoritative decision of these important constitutional questions. All the parties are faced with imminent harm, whichever way the Special Court decides, if that decision should be constitutionally incorrect. And an erroneous exclusion of Penn Central from reorganization under the Act would do violence to the public interest, which plainly dictates such reorganization if the Act is not inconsistent with the preservation of adequate constitutional remedies.

(2) The lower court was in error; the Act contains no requirement that Congress approve the final system plan. The plan becomes effective automatically unless either House of Congress disapproves it within 60 days. And even if Congress should disapprove the first plan, further plans must be submitted until one of them is not disapproved. Since that plan will necessarily provide for a mandatory conveyance of Penn Central property to Conrail there is no possibility, other than through a change in the statute, that the constitutional question before this Court will be mooted or its essential contours altered.

(3) The Special Court "shall" order the conveyance within ten days of the submission of the final system plan to

it. Its order is a ministerial act, and is not subject to appeal. The Act plainly was structured to exclude any exercise of discretion by the Special Court at the mandatory-conveyance stage. Thus the Special Court's order is not a "contingency" which makes decision by this Court premature. Indeed, since the Special Court will then have no choice, this action presents the last opportunity for any court to decide whether a mandatory conveyance can be allowed to go forward, on the basis of a Tucker Act remedy, in spite of the limitations in the Act on the form and amount of the consideration to be paid therefor. The Special Court cannot authoritatively decide that question in the cases presently before it, since a decision by it with respect to Court of Claims jurisdiction would have no binding effect.

IV.

The Act cannot be sustained, absent a Tucker Act remedy, unless it assures that the consideration to be paid for Penn Central's properties is equal to the "constitutional minimum" which the estate must receive. However the constitutional minimum be defined, there can be no assurance that the consideration paid under the Act will equal it. That consideration is required to be, for the most part, securities of Conrail. But at the present time there can be no assurance that Conrail securities will have any value at all, let alone a value equal to the minimum constitutionally required. Nor can there be any assurance that the other consideration permitted by the Act will make up any inadequacy.

V.

If the availability of an adequate Tucker Act remedy is established by this Court's decision, the constitutionality of the Act can be sustained. For the remedy to be adequate, it

must be clear that Penn Central will be entitled to a Court of Claims judgment for any deficiency in the compensation paid for the properties mandatorily conveyed, and also for any loss caused by erosion if such erosion has passed, or passes, the point at which continued loss operations become unconstitutional if for the account of the estate. The Court of Claims judgment need only be for a deficiency — for the amount still owing after taking account of the non-cash consideration paid under the Act — so long as that consideration is valued only at its cash value on the date of its receipt. Otherwise the Act would offend the constitutional requirement that compensation for a taking be paid in cash or cash equivalent. Valuing speculative railroad securities at an "intrinsic" value in excess of their value when received — the device which proved so disastrous in the *New Haven* reorganization — must be excluded.

With one exception, the Act does not violate the "uniform rules of bankruptcy" clause of the Constitution. The Act is, as the Court below held, based on the commerce clause as well as on the bankruptcy clause, and in addition makes a reasonable classification of debtors based on the unique current railroad crisis in the Northeast. The exception is the provision which would deny to Northeastern railroads excluded from the Act, but to no others, the opportunity to reorganize under Section 77 on an other-than-income basis. That is an indefensible geographical discrimination and must be stricken, but it is readily severable.

ARGUMENT

I.

THE ACT DOES NOT EXCLUDE A TUCKER ACT REMEDY FOR ANY TAKING OF PROPERTY ACCOMPLISHED PURSUANT TO THE ACT.

The Tucker Act provides (28 U.S.C. § 1491):

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

An action by the Trustees for just compensation for the properties taken pursuant to the Act would be founded upon the Fifth Amendment to the Constitution. Successful actions pursuant to the Tucker Act based on takings of property are, of course, legion. While in a few early cases the courts took the view that an action for a taking could be maintained only if a contract to pay could be implied in fact, the weight of authority has been, and recent cases have consistently held, that the Fifth Amendment itself creates a right to just compensation for any taking and the Tucker Act provides the necessary waiver of immunity which confers jurisdiction. *See United States v. Causby*, 328 U.S. 256 (1946); *Jacobs v. United States*, 290 U.S. 13 (1933); *Feldwin Realty Co. v. United States*, 169 F. Supp. 73, 76 (D.N.J. 1959); *Aris Gloves, Inc., v. United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970); *Eyherabide v. United States*, 345 F.2d

565 (Ct. Cl. 1965). It is not a necessary element of an action under the Tucker Act that the Government intended to pay for or even that it intended to take the property involved; so long as a taking in fact occurred the Court of Claims has jurisdiction and the payment of just compensation will be required. *United States v. Causby, supra; Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18, 21 (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *Sioux Tribe of Indians v. United States*, 315 F.2d 378 (Ct. Cl. 1963); *Richard v. United States*, 282 F.2d 901 (Ct. Cl. 1960); *Foster v. United States*, 98 F. Supp. 349 (Ct. Cl. 1951); *Cotton Land Co. v. United States*, 75 F. Supp. 232 (Ct. Cl. 1948).

The fact that the Rail Act provides a means of securing some consideration for the properties to be taken does not eliminate the Court of Claims' jurisdiction to award a judgment against the United States to fill any gap between the value of the consideration awarded pursuant to the Act and the just compensation required to be paid for the properties taken. Where a statutory provision for determining compensation is constitutionally inadequate, parties are not precluded from availing themselves of other statutory rights such as those under the Tucker Act. *Cf. DeSalvo v. Arkansas Louisiana Gas Co.*, 239 F. Supp. 312 (E.D. Ark. 1965). *Fort Berthold Reservation v. United States*, 390 F.2d 686 (Ct. Cl. 1968), was brought under a provision of the Indian Claims Commission Act creating in the Commission jurisdiction of "claims in law or equity arising under the Constitution" — a provision substantially identical, of course, to the Tucker Act provision at issue here. 390 F.2d at 690, n. 1. The act of Congress authorizing the taking in question had expressly provided for compensation at a stated dollar amount per acre. The Court of Claims had no difficulty in finding that a taking had oc-

curred within the meaning of the Fifth Amendment to the Constitution, and that the jurisdictional provision quoted above authorized an action against the United States to recover the difference between the value of the land thus taken and the amount received by the owners pursuant to the Congressional directive. The case is virtually on all fours with the present situation.

The general jurisdiction conferred upon the Court of Claims by the Tucker Act has been held precluded only in those instances where it has been very clearly withdrawn, such as where another court or agency has expressly been given exclusive jurisdiction to award the same relief as the Court of Claims could otherwise provide. See *Johnson v. Emergency Fleet Corp.*, 280 U.S. 320 (1930); *United States v. Pfitsch*, 256 U.S. 547 (1921); *Thomason v. United States*, 184 F.2d 105 (9th Cir. 1950); *Cook v. United States*, 115 F.2d 463 (5th Cir. 1940); *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967); *South Puerto Rico Sugar Co. v. United States*, 334 F.2d 622, 626 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965); *Hele v. United States*, 100 Ct. Cl. 289, 294 (1943).

But all that Congress has provided in the Act is a means for determining the value of the properties taken and the value of the securities to be issued as compensation. The Special Court is not empowered by the Act to render a judgment against the United States should the value of the securities prove inadequate to compensate the railroad estates for the properties taken; thus, the Special Court has not been empowered to determine or to award the just compensation which the Constitution requires. Such a judgment can only be rendered by the Court of Claims.

Repeals by implication of the jurisdiction of federal courts are not lightly to be implied, and will be held to have occurred only on a clear and convincing showing. *Federal*

Sugar Refining Co. v. United States, 30 F.2d 254, 255 (2d Cir. 1929) (L. Hand, J.), *aff'd, Johnson v. United States Shipping Board Emergency Freight Corp.*, 280 U.S. 320 (1930).[2] Especially is this the case where a holding that jurisdiction has been repealed by implication would necessarily result, as the court below correctly held it would result, in a holding that the Act is in whole or in part unconstitutional. See, *e.g., Catlin v. United States*, 324 U.S. 229, 241 (1945). The Court should of course make every effort to construe an act of Congress in a way that makes it constitutional rather than unconstitutional. *E.g., United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971); *American Communications Association v. Douds*, 339 U.S. 382, 407 (1950); *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 120-121 (1948); *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909).

If Congress in enacting the present Act had withdrawn a Court of Claims remedy, then, as the Court below recognized, the Act would be at least in part unconstitutional, since neither title nor possession to property sought to be taken may be given in the absence of a reasonable, certain and adequate provision for obtained just compensation.

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[2]Repeals of statutes by implication are never favored; the party urging such a repeal has a strong burden of persuasion; a law is not to be held repealed by implication unless no other reasonable construction can be found, and unless the new statute is so repugnant to the old one that they cannot be reconciled. *E.g., Amell v. United States*, 384 U.S. 158 (1966); *Mercantile Nat'l Bank v. Longdean*, 371 U.S. 555 (1963); *Rosenberg v. United States*, 346 U.S. 273 (1953); *FTC v. A.P.W. Paper Co.*, 328 U.S. 193 (1946); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *Ex parte Cohen*, 191 F.2d 300 (9th Cir. 1951), *cert. denied*, 342 U.S. 947 (1952); *Nagano v. McGrath*, 187 F.2d 759 (7th Cir. 1951), *aff'd*, 342 U.S. 916 (1952); *Fawcett v. C.I.R.*, 149 F.2d 433 (2d Cir. 1945).

United States v. Dow, 357 U.S. 17, 21 (1958); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923); *Miller v. United States*, 57 F.2d 424 (App. D.C. 1932); *Stringer v. United States*, 471 F.2d 381, 384 (5th Cir. 1973).

But in the present case, there is no difficulty — no straining of either the text or the legislative history of the Act — involved in holding that it did not unconstitutionally attempt to exclude a Tucker Act remedy for a taking. If Congress had so intended, it would have been easy to exclude such a remedy by a simple and express provision. In fact, as the court below conceded (J.A. p. 45), the Act contains no fewer than *thirteen* provisions repealing or making inapplicable the provision of various laws or excluding the jurisdiction of federal courts on various subjects. Since none of these thirteen provisions excludes a Tucker Act remedy — although Congress was made aware of the possibility of such a remedy — Congress must be deemed to have deliberately rejected the readily available option of including such an exclusionary provision in the Act.

The thirteen repealing or jurisdiction-excluding provisions in the Act are found in Sections 202(a), 205(c)(2), 206(d)(3), 207(b), 209(a), 209(b), 303(b)(2), 303(d), 304(c), 304(f), 601(a)(2), 601(b) and 601(c).

Sections 202(a)(10) and 205(c)(2) exempt United States Railroad Association (USRA) and the Rail Services Planning Office, respectively, from the provisions of Section 3709 of the Revised Statutes, 41 U.S.C. Section 5. Section 206(d)(3) provides that certain determinations by USRA and the ICC shall not be reviewable in any court. Section 207(b) provides that appeals from orders made under that subsection may be taken only to the Special Court, whose decisions are not subject to further review. Section 207(b) also in effect repeals part of the jurisdiction created by Section 77 of the Bankrupty Act by requiring dismissal of Section 77 proceedings in certain circumstances.

Section 209(a) provides that the final system plan shall become effective after review by Congress "notwithstanding any other provision of law" and is "not subject to review by any court except in accordance with this section." Here Congress provides that no court may review the contents of the final system plan — the document which establishes what railroad properties shall be taken — and that the plan is to become effective notwithstanding any other provisions of law. Obviously nothing here purports or attempts to exclude a Tucker Act remedy for just compensation for the properties so taken.

Section 209(b) authorizes the Judicial Panel on Multi-District Litigation to create a Special Court and to consolidate therein all judicial proceedings with respect to the final system plan, and to issue rules for the conduct of the Panel's functions. The section goes on to provide that "no determination by the panel [on Multi-District Litigation] under this subsection may be reviewed in any court." Here again Congress demonstrated that it well knew how to exclude jurisdiction of federal courts when it wished to do so.

Section 303(b)(2) provides that mandatory conveyances ordered pursuant to the Act by the Special Court "shall not be restrained or enjoined by any court." Section 303(d) provides that, after the Special Court enters its orders with respect to compensation which are authorized by prior subsections of Section 303, an appeal may be taken to the Supreme Court and "that such appeal is exclusive." This makes a single appeal to the Supreme Court the only means by which interested parties may question whether the Special Court has properly performed the functions allocated to it by Section 303. Since those functions do not include consideration of any question whether the com-

pulsory conveyance pursuant to the Act constitutes a taking of property or the amount of just compensation due therefor,[3] Section 303(d) in no way attempts to exclude a Tucker Act remedy for such a taking. To the contrary, Section 303(d) yet again demonstrates that Congress was fully aware of the necessity of excluding various types of jurisdiction and did so expressly when it wished to do so.

Section 304(c) provides that railroad abandonments permitted under the section may be made "notwithstanding any provision of the Interstate Commerce Act" or of other laws. Section 304(f) provides that the inhibition on interim abandonments imposed by that subsection prevails "notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority."

Section 601(a)(2) provides that "the antitrust laws are inapplicable with respect to any action taken to formulate or implement the final system plan where such action was

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[3]The Special Court is charged by Section 303(c)(2)(C) with entering a judgment against Conrail if a lack of fairness and equity cannot be completely cured by the other means made available to the court. What is conspicuously absent is any authorization for the Special Court to decide whether a judgment against Conrail *does* completely ensure fairness and equity, *i.e.*, whether it meets the "constitutional minimum" standard (Section 303(c)(1)(B)), for just compensation. Since that fundamental question is carefully and deliberately excluded from the Special Court's jurisdiction, the provisions of Section 303(d), creating a single appeal to the Supreme Court from the Special Court's decision of the matters it is authorized to decide, is in no way inconsistent with the preservation of remedies for a taking in the Court of Claims pursuant to the Tucker Act. If the court below meant to intimate otherwise by its observation (J.A. p. 51) that "judicial review is delineated with specificity in Sections 209(a) and 303 with no mention of the Court of Claims," its reasoning is plainly unsound.

in compliance with the requirements of such plan." Section 601(b) similarly makes inapplicable the provisions of the Interstate Commerce Act "whenever a provision of any such act is inconsistent with this Act." And Section 601(c) provides that certain provisions of the National Environmental Policy Act of 1969 "shall not apply with respect to any action taken under authority of this Act before the effective date of the final system plan." These provisions are contained in Title VI of the Act, in a sub-title headed "Relationship to Other Laws." If Congress had wished also to exclude the application of the Tucker Act, it obviously would have added such an exclusion to the very explicit provisions of Section 601 excluding the applicability of various other laws.

Given the absence of any explicit provision excluding the Tucker Act remedy, plus the necessary implication from the provisions discussed above that the Tucker Act was not rendered inapplicable, plus the strong reluctance which the Court must feel in finding a repeal by implication when that would render the Act in whole or in part unconstitutional,[4] the legislative history would, at least, have

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[4]If the Act were construed to repeal Tucker Act jurisdiction without substituting (as of course it does not substitute) a fully equivalent and adequate remedy ensuring just compensation, the repeal of jurisdiction should be held unconstitutional. "[W]hile Congress has the undoubted power to give, withhold and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without . . . just compensation." *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948); see also *Graham & Foster v. Goodcell*, 282 U.S. 409, 431 (1931); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930); *United States v. Klein*, 80 U.S. 128, 144-45 (1871). Thus even if the Court should determine that some provision of the Act repeals Tucker Act jurisdiction, it should strike down that provision alone pursuant to the separability clause of the Act, Section 604.

to show clearly and conclusively that Congress intended to exclude a Tucker Act remedy to warrant this Court in so holding.

The legislative history shows no intent whatever to exclude a Tucker Act remedy in the event that the Act was held to effect a taking of property. Congress did indeed attempt to structure the Act so that no taking would occur. But Congress' intent on that point is wholly irrelevant, since the law is clear that the determination of whether a taking has occurred is a purely judicial function, and that no intent of Congress to effect a taking or to pay therefor is necessary, but only that Congress intend that the acts occur which in law constitute a taking. See cases cited at p. 15, *supra*.

What is entirely absent from the legislative history is any intent to preclude the jurisdiction of the Court of Claims in the event that it should be judicially determined that Congress had been unsuccessful in its desire to avoid a taking. Senator Hartke, one of the managers of the bill, specifically adverted to the possibility of a successful Court of Claims suit if the bill was not structured to avoid a taking. 119 Cong. Rec. S. 23783-84 (1973), quoted in part by the court below, J.A. p. 49. The remarks by Congressman Adams relied on by the court below (J.A. pp. 49-50) amount to, at most, (1) a correct declaration that *the Act itself* contained no provision for a remedy against the United States, and (2) an erroneous legal judgment that Congress had been successful in structuring the Act so that there would be no taking, and hence no *recovery* in a Court of Claims action.

Congress had, in addition, been warned by Claude S. Brinegar, Secretary of Transportation, that the provisions of the Act would not succeed in avoiding a taking and that further amendments were necessary to accomplish that

result. On November 14, 1973 Secretary Brinegar wrote the Senate Committee on Commerce warning that the draft bill then before the committee would be held to effect a compulsory taking of railroad property under the Fifth Amendment to the Constitution. *Rail Services Act of 1973, Report No. 93-601 of the Senate Committee on Commerce*, 130 (93d Cong., 1st Sess. 1973), J.A. pp. 214-20. Secretary Brinegar assumed as axiomatic (and as we have shown his assumptions were correct) that Congress could be held to have effected a taking without intending it, and that if a taking did occur, a remedy for the constitutionally required compensation would be available. The Secretary declared that the only way to avoid a taking would be to provide an option by which a conveyance under the Act could be avoided by the courts; that such an option would have to be one other than an "illusory" option; and that for an option to be other than illusory it would have to be an option to be exercised at a time when all aspects of the final system plan were known and could be assessed, including, in particular, the compensation to be received and the factors bearing on the value thereof.

The Secretary concluded that "in order to avoid condemnation, it is necessary to give the special court the right to turn the final system plan down with respect to each of the railroads in reorganization." *Senate Report, supra*, at 133, J.A. p. 220. Again, "if this is to be deemed a reorganization [as opposed to a condemnation], the court must have the opportunity to say no to the final system plan at a time when all the relevant facts can be presented to it." *Ibid.* Accordingly, the Secretary transmitted amendments which would have provided for a hearing before the special court, after presentation to it of the final system plan, after which the court would determine whether the plan was fair and equitable with respect to each estate and, if not, would remand each case to its reorganization court.

with the result that the compulsory conveyance to Conrail would be avoided. See Proposed Amendments, Annex C hereto, pp. 10a-12a, *infra*.

Congress, placed fully on notice by the Secretary of what would be necessary to avoid a taking, (1) chose not to accept the amendments he proposed, and (2) having been made intensely aware that, if the Secretary were right, a Tucker Act remedy would exist, nonetheless deliberately refrained from adding to the many other repealing and jurisdiction-excluding provisions of the Act any provision making the Tucker Act inapplicable. Thus, while under the relevant case law it is not at all necessary that Congress realize that it is effecting a taking for a taking to be held to have occurred as a result of its actions, in this instance Congress knew exactly what it was doing and must be deemed to have opened the way for the one remedy which would make its action constitutional: *i.e.*, a remedy for just compensation under the Tucker Act.

Congress' attempt to structure the procedures established by the Act as a "reorganization," while doubtless related to its desire to avoid a taking if at all possible consistently with its other objectives, indicates no intent to exclude a Tucker Act remedy. Indeed, by its reference in Section 303(c)(1)(B) to the "constitutional minimum" of compensation required, Congress recognized that there is such a constitutional minimum which must be met; and, of course, it was well aware that the Tucker Act creates jurisdiction of claims against the United States in all actions founded upon the Constitution.

Congress was obviously further aware that the plentiful case law establishing a "constitutional minimum" in railroad reorganization rests upon the doctrine that, if the constitutional minimum is not met, there is a taking of property for which the Fifth Amendment to the Constitution requires that just compensation be paid. See pp. 54-56, *infra*. "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

For the above reasons, we think it plain that the Act cannot and should not be construed to repeal the Tucker Act *pro tanto* or to exclude the undoubted jurisdiction of the Court of Claims to entertain actions against the United States, founded upon the Constitution, for takings of property without just compensation. We would in addition point out, however, that if the Court entertains any doubt as to Congress' intention on this score, it will not, by holding in favor of the existence of the Tucker Act remedy, compel the expenditure of any public funds contrary to the desire of Congress. If, after such a holding, Congress believes that its intent has been frustrated or that the price for continuation of rail service in the Northeast is too high if it must meet constitutional standards, Congress will have more than adequate time, prior to any compulsory conveyance under the Act, to repeal the Act or to amend it so as to avoid a taking of property. The earliest time at which compulsory conveyances under the Act could be made is September 1975. This gives Congress ample time to consider whether it still wishes such conveyances to proceed after it is fully on notice of the legal consequences thereof. Moreover, under Section 208 of the Act, Congress must review the final system plan in any event, and will have the opportunity to disapprove or to amend the final system plan, or to amend the Act, if it is unwilling to pay the cost of the taking. There is no risk whatever that unintended or undesired obligations will be incurred.

In this sense the present situation is closely analogous to cases where a condemnation proceeding is instituted either

without a Congressional appropriation of funds or where Congress has imposed limitations on expenditures for the project in question which would or might be exceeded by a judgment in the condemnation action. In such situations the courts have uniformly held that the condemnation proceeding should go forward to judgment, and if Congress proved unwilling to appropriate the necessary funds the condemnation might be abandoned at any time prior to the actual taking. *E.g., Barnidge v. United States*, 101 F.2d 295, 298 (8th Cir. 1939); *Commercial Station Post Office, Inc., v. United States*, 48 F.2d 183, 185 (8th Cir. 1931); *United States v. 40.75 Acres of Land*, 76 F. Supp. 239, 245 (N.D. Ill. 1948). In *Catlin v. United State*, 324 U.S. 229, 241 (1945), the Court went further and, in order to save a "taking" statute from possible unconstitutionality, construed it as giving the Government, upon transfer of title, "only a defeasible title in cases where an issue concerning the validity of the taking arises. . . . The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity . . . , would raise serious question concerning the statute's validity."

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), and *Hooe v. United States*, 218 U.S. 322 (1910), furnish no support for the conclusion of the court below. *Youngstown* involved a seizure of property carried out by the President without any Congressional authority; the Court simply held that such a seizure was not a "taking" by the United States for which just compensation would lie, but merely an illegal individual act which could be enjoined. Similarly, in *Hooe*, the Civil Service Commission had occupied the basement of a privately owned building even though Congress had repeatedly refused to appropriate money to pay the rent therefor, and a statute in force provided that " 'hereafter no contract shall be made for the rent of any building . . . until an appropriation therefor

shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or any part of building'." 218 U.S. at 331. The Court naturally held that there had been no taking by the United States, but merely an unauthorized trespass by officials, which could not create a claim against the United States. 218 U.S. at 335-36. "The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government." 218 U.S. at 336. Here, to the contrary, there is no dispute that Congress has fully and expressly authorized the acts which in law constitute a taking, and under established and unquestioned doctrine that is enough to constitute a taking by the United States for which just compensation is required. See p. 15, *supra*, and authorities there cited.

Far more similar to the present situation is *Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947), where the "taking" statute at issue (the Trading with the Enemy Act) contained no provision for compensation, but where the Court declined to hold it unconstitutional on that ground, "We must assume that the United States will meet its obligations under the Constitution. Consequently, friendly aliens will be compensated for any property taken . . . ." 332 U.S. at 480. See also the circuit court opinion, *Silesian-American Corp. v. Markham*, 156 F.2d 793, 796-97 (2d Cir. 1946) (L. Hand, J.).

A Tucker Act remedy adequate to save the constitutionality of the Act cannot be excluded on the ground that no appropriation has yet been enacted to pay a judgment of the Court of Claims. The court below may have feared (*cf.* J.A. pp. 50-52) that Congress could either simply ignore such a judgment or that, once this Court has held a

Tucker Act remedy available, Congress could withdraw the jurisdiction of the Court of Claims to hear any claim arising from implementation of the Act. That Congress could constitutionally so legislate is at best highly questionable in view of the authorities cited at p. 21, *supra*, n. 4. Be that as it may, if such possibilities were enough to render takings unconstitutional, then every taking would be invalid and would have to be enjoined except those in which full payment was made, or at least an appropriation voted, prior to the taking itself. That is not the law; the contention that it is has been repeatedly and unanimously rejected by the courts. See cases cited at p. 26, *supra;* see also, *e.g., Glidden v. Zdanok*, 370 U.S. 530, 569-72 (1962); *Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 586-87 (1923); *Crozier v. Krupp*, 224 U.S. 290, 306 (1912); *Great Falls Mfg. Co. v. Attorney General*, 124 U.S. 581 (1888); *In re Spier Aircraft Corp.*, 137 F.2d 736 (3d Cir. 1943), *cert. denied sub nom. Coombs, Trustee, v. United States*, 321 U.S. 770 (1944); *City of Oakland v. United States*, 124 F2d 959 (9th Cir.), *cert. denied*, 316 U.S. 679 (1942); *Potomac Electric Power Co. v. United States*, 85 F.2d 243 (D.C. Cir.), *cert. denied*, 299 U.S. 565 (1936); *Lee v. United States*, 58 F.2d 879 (D.C. Cir. 1932); *Commercial Station Post Office, Inc., v. United States*, 48 F.2d 183, 185 (8th Cir. 1931); Note, The Constitutional Status of the Court of Claims, 68 Harv. L. Rev. 527, 531 & n. 33 (1956).

We fail to understand the court below's characterization of Court of Claims jurisdiction as "an implied remedy" (J.A. p. 41), its apparent belief that the jurisdiction was somehow repealed unless Congress indicated an affirmative intent to preserve it, or its view that simple recognition of a statutory remedy available for over a century would somehow amount to "judicial legislation" (J.A. p. 53). The

cases previously cited demonstrate that it is not necessary that the Act specifically mention a Tucker Act remedy in order for such a remedy to exist. Clearly the remedy does exist absent a Congressional withdrawal of jurisdiction from the Court of Claims. The court below did not find, nor could it have found, that Congress withdrew jurisdiction from the Court of Claims. It based its decision, rather, on the absence of any reference in the Act to the availability of a remedy in that court. But no such reference was required.

Moreover, the court did not give proper weight to Section 303(c)(1)(B) of the Act, which plainly recognizes that the compensation to be received for properties conveyed must satisfy the constitutional minimum. To hold the Act unconstitutional rather than affirming the availability of a Court of Claims action is to conclude that the intention of Congress to provide constitutionally acceptable compensation should be ignored merely because Congress omitted specifically to refer to the only means by which that intention can be carried out: the Tucker Act. That conclusion is erroneous.

Doubtless the court below would never have been led to such a view of the law were it not for its concern that a Court of Claims recovery in this case might be substantial. If the dollar amount possibly involved were less, the Court of Claims' obvious jurisdiction would hardly be a matter of controversy. But to ignore both Congressional enactments and every pertinent legal principle because of such a concern is "judicial legislation" if anything is.

For the reasons stated, the Act does not exclude a Tucker Act remedy for just compensation for any and all takings of property effected by the Act, including both the permanent taking resulting from compulsory conveyances of rail properties to Conrail and any temporary taking resulting from the compelled continuation of losing rail operations

past the point where erosion becomes unconstitutional if for the account of the estate.

II.

IF THE COURT BELOW WAS CORRECT IN CONCLUDING THAT NO COURT OF CLAIMS REMEDY EXISTS, THEN ITS CONCLUSION THAT THE ACT IS UNCONSTITUTIONAL WITH RESPECT TO INTERIM EROSION IS ALSO CORRECT.

The court below held that the failure of the Act to provide any compensation to the Penn Central estate for interim erosion, during the lengthy, indeed unlimited,[5] planning period while continuance of rail operations is required, is unconstitutional as a taking of property without adequate provision for the just compensation required by the Fifth Amendment. We believe that, if the court below was correct in also concluding that the Act precludes any remedy in the Court of Claims under the Tucker Act by which compensation for such erosion could be obtained, its conclusion as to the unconstitutionality of the Act with respect to erosion is plainly correct.

The Penn Central Reorganization Court reached a similar conclusion in its 180-day decision, holding the Act not "fair and equitable" with respect to the Penn Central (J.A. pp. 124-51) because of, *inter alia*, its failure to provide compensation for interim erosion. Similar views have also been suggested by the Court of Appeals for the Third Circuit in *In re Penn Central Transportation Co.* (Columbus Option Appeals), 494 F.2d 270, 283 (1974), *petition for cert. filed*, 42 U.S.L. Week 3633 (U.S. May 8, 1974), No. 73-1672;[6] and were foreshadowed in early 1973 by the Penn Central Reorganization Court. *In re Penn Central Transportation Co.*, 355 F. Supp. 1343, 1344, 1346 (1973).[7]

[5] See p. 41, *infra*, n. 13.

The court below correctly held that it was not necessary to decide when the point of unconstitutionality had been or would be reached in order to hold that the Act's failure to provide for interim erosion contravenes the Fifth Amendment. Likewise, no findings were necessary as to the amount of erosion which has taken place up to the present time. That it has been massive is indisputable. The Government conceded [8] in the Reorganization Court that since the Section 77 petition was filed in June 1970 the financial erosion alone — new obligations which prime all pre-bankruptcy claims — consists of Trustees' certificates ($100 million), accrued and deferred state and local taxes ($195 million, which will increase by the end of 1975 by another $118 million), and an increase in current liabilities of $185 million — a total of between $457 and $480 million, with $118 million more inevitable. So far as unsecured creditors — and equity holders — are concerned, one must

[6] The court said: "If, as some of the reports filed by the Trustees suggest, it is already clear that such a reorganization is not feasible, then this reorganization is already at the point where the erosion of the estate in deficit operations must cease and a liquidation alternative must be considered if the secured creditors or other interested parties insist upon such consideration." Since that statement was made, the Penn Central has been found, in the "120-day" decision, to be not reorganizable on an income basis within a reasonable time. J.A. p. 103.

[7] The court said: "Under any view of the matter, it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived . . . . On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973."

[8] Argument of May 6, 1974, on Motion of New Haven Trustee to Dismiss Section 77 Petition, Tr. 12, 284-12, 288.

add as much as $104 million in deferred mortgage and collateral bond interest, subject to the possibility that not all of these obligations are fully secured. And added to all that is the continuing — indeed escalating — physical erosion of the Penn Central rail plant.[9] The court below, after analysis of the evidence before it, concluded that the Penn Central estate between June 21, 1970 and the end of 1973 had sustained ordinary net losses in the amount of $851 million (J.A. p. 36). While there may be some offsets, as, for example, possible increases in Penn Central's net equity in equipment as payments are made on certain equipment obligations, offsets are minor in comparison.

The Government is in error in asserting that an alleged — and unquantified — appreciation in the value of non-rail assets can be considered in the offset category. This Court has made it clear that the public interest cannot compel the continuation of deficit rail operations even though non-carrier operations of the enterprise in question generated a profit that more than offset the carrier losses. *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396 (1920).

Moreover, using possible gains in the value of some assets to offset the erosion from rail losses would be unfair in Penn Central's situation. The numerous classes of claimants to the Penn Central estate hold claims representing quite different interests in different assets. For example, some of the secured creditors have liens primarily on rail assets while others have liens primarily on non-rail assets. Continued railroad losses take the property of claimants primarily entitled to payment from the rail assets

[9] See Report of Trustees dated April 3, 1974, Item 10, Joint Documentary Submission (J.D.S.). Ten copies of the Joint Documentary Submission, which supplements the Joint Appendix, have been lodged with the Clerk.

while preventing claimants primarily entitled to payment from non-rail assets from collecting their debt. While each class of claimants is affected differently by a required continuance of rail operations, the result is unfair to all claimants.

The Government's arguments based on appreciation of assets, both rail and non-rail, essentially amount to the contention that the creditors can be made to suffer the entire burden of inflation by being endlessly delayed from any satisfaction of their claims while the face amount thereof steadily declines in real value. If the creditors' claims had been satisfied when due, or were satisfied today, they of course would be free to invest the proceeds in short-term or non-fixed-dollar-amount securities so as to avoid inflation losses, and also to obtain the higher rates of interest prevailing in an inflationary period. If the Government is correct that inflationary paper "increases" in asset value can cancel out erosion from income-statement losses (even though, on its theory, there is no way the creditors can realize *any* asset value), then — if inflation is great and rapid enough — there is no erosion at all, and on the Government's theory the creditors can be forced to wait indefinitely, receiving nothing, while the value of their claims is effectively confiscated. We submit that no court could accept so unconscionable a theory.

Finally, all the Government's contentions as to methods computing erosion, which we dispute, are beside the point. The Government has conceded in its brief to the Special Court there has been very substantial erosion, and nowhere denies that it will continue. And the Government stops short of contending that such erosion necessarily fails and will continue to fail to reach constitutional proportions. These concessions require, we submit, that the Court cannot find the Act constitutional unless it holds that, if

erosion has reached or reaches constitutional proportions, a Tucker Act remedy is available. The court below unanimously held that "a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication" (J.A. p. 40). That holding is plainly correct and requires that the statute be held unconstitutional unless a remedy for such erosion is provided. Since the Act requires continuation of losing rail operations wholly without regard to whether erosion has passed the point of unconstitutionality, it is necessarily unconstitutional (absent a Court of Claims remedy) whether the point of unconstitutionality has been passed already or whether that point will be reached in the future.

A. Deficit Rail Operations May Not Constitutionally Be Required Without, at Least, the Assurance of Successful and Prompt Reorganization.

The present situation in regard to the Penn Central is unprecedented only in terms of scale and public importance; it is by no means unprecedented in principle. In the words of Mr. Justice Holmes, "[I]f the [railroad] be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396, 399 (1920), cited with approval in *Bullock v. Railroad Comm'n of Florida*, 254 U.S. 513 (1921).

In *Railroad Comm'n of Texas v. Eastern Texas R.R.*, 264 U.S. 79 (1924), the Supreme Court again emphasized the right to cease an operation which can only be

conducted at a loss: "And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss, or to give up the salvage value, would be to take its property without the just compensation which is a part of due process of law." 264 U.S. at 85.

The doctrine of these cases was reaffirmed several times in the New Haven reorganization proceedings, wherein the courts concluded that the Constitution gave the New Haven the right to cease operation and to liquidate. See *New York, N.H. & H.R.R. Bondholders' Committee v. United States*, 289 F. Supp. 418, 440-41 (S.D.N.Y. 1968); *In re New York, N.H. & H.R.R.*, 289 F. Supp. 451, 454, 459-60 (D. Conn. 1968). On remand the Interstate Commerce Commission argued that there was no constitutional right to compel liquidation of a railroad operating at a loss and that the Commission could require continued operation for as long as the public interest demanded. 334 I.C.C. 25 (1968). On further review both the reorganization court and the three-judge court rejected that argument and again recognized the constitutional rights of the New Haven creditors. See *New York, N.H. & H.R.R. First Mortgage 4% Bondholders' Committee v. United States*, 305 F. Supp. 1049, 1055 (S.D.N.Y. 1969); *In re New York, N.H. & H.R.R.*, 304 F. Supp. 793, 801-04 (D. Conn. 1969). Judge Anderson's opinion was particularly emphatic:

> "This Court, therefore, concludes that *Brooks-Scanlon* and subsequent cases, reaffirming the validity of its holding, are still applicable and determinative. The Commission is unable through a groundless construction of statutes, as noted above, to eliminate the constitutional guarantees applicable to this

> case. And it may not arrogate to itself a vast expansion of power through a strained interpretation of Supreme Court decisions." 304 F. Supp. at 804.

This Court affirmed Judge Anderson's conclusions and order. *New Haven Inclusion Cases*, 399 U.S. 392, 489-95 (1970).

Other cases have also acknowledge that *Brooks-Scanlon* set forth the basic constitutional standard. See, *e.g.*, *In re Penn Central Transportation Co.* (Columbus Option Appeals), 494 F.2d 270, 278-82 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L. Week 3633 (U.S. May 8, 1974), No. 73-1672; *In re Central R.R. of New Jersey*, 485 F.2d 208 (3d Cir. 1973); *City of New York v. United States*, 337 F. Supp. 150, 160 (E.D.N.Y. 1972); *Brooklyn Eastern District Terminal v. United States*, 302 F. Supp. 1095, 1099 (E.D.N.Y. 1969); *Jay Street Connecting R.R. v. United States*, 174 F. Supp. 609, 615 (E.D.N.Y. 1959).

Even when there may be some hope for a reorganization of the railroad which will restore it to viability, the prohibition against the taking of property without payment of just compensation limits the time during which operations at a loss may be required in the public interest. The rights of creditors may be invaded only for a reasonable time, *New Haven Inclusion Cases, supra*, 399 U.S. at 484-93; *In re New York, N.H. & H.R.R., supra*, 289 F. Supp. at 459, and even then only if there is solid prospect that within a reasonable time a reorganization will be effected. *In re Third Ave. Transit Corp.*, 198 F.2d 703 (2d Cir. 1952); *In re New York, N.H. & H.R.R.*, 281 F. Supp. 65 (D. Conn. 1968).

A "reasonable time," in such circumstances, must be determined in light of the particular facts of each

reorganization. See *New Haven Inclusion Cases, supra*, 399 U.S. at 490-93. In this connection, a review of the facts in the New Haven proceeding is instructive. Early in that proceeding, it became clear that the New Haven could not survive as an independent railroad, and that the only alternative to liquidation was its inclusion in a larger rail system. In 1962 the New Haven petitioned for inclusion in the proposed merger of the New York Central and Pennsylvania Railroads. The Trustees' decision to seek inclusion was supported by the New Haven's creditors. The Commission authorized the merger of Penn and Central in 1966, but conditioned its order upon the inclusion of New Haven in the merged system.

Inclusion did not, however, promptly occur. Extensive litigation over the price to be paid for New Haven's assets ensued. In 1967, after the New Haven's petition for inclusion had been approved, two of the several active bondholder groups filed a motion to dismiss the Section 77 proceeding. This motion the reorganization court denied in February, 1968, relying primarily on its hope that final approval and implementation of the first step of the New Haven plan was near at hand. *In re New York, N.H. & H.R.R.*, 281 F. Supp. 65, 69 (D. Conn. 1968). The court's hope, however, was not realized. Both the reorganization court and the three-judge court reviewing the Commission's action approving inclusion found grounds for reversal. The result was that, only six months after it had denied the motion to dismiss, the reorganization court on its own motion ruled that if inclusion were not effected by year's end it would no longer permit the New Haven to continue its operations at a loss and would entertain a motion to dismiss the proceeding. *In re New York N.H. & H.R.R.*, 289 F. Supp. 451 (D. Conn. 1968).

> "[T]his court finds that the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property and consequently the interests of the bondholders, without just compensation. It is therefore constitutionally impermissible, and obviously no reorganization plan which calls for such a taking can be approved." *Id.* at 459.

The reorganization court thus ruled that it must call a halt even though an ultimate solution was assured. The court's drastic action produced results — the inclusion of New Haven in the Penn Central on December 31, 1968 — and subsequently was specifically approved by the Supreme Court in the *New Haven Inclusion Cases, supra,* 399 U.S. at 415.

The *New Haven* precedent therefore establishes that railroad owners and creditors may be compelled to suffer erosion only if there is a feasible, assured means for reorganizing the railroad, and even then only if that reorganization is effected within a reasonable period. It is plain that the courts would never have tolerated erosion to the extent or for the length of time they did in *New Haven* if the inclusion remedy had not been available, and if the course pursued by the New Haven Trustees in seeking inclusion had not had the consent and support of the New Haven's creditors in the early years of the proceeding.

In the present situation, the Government has relied in the Special Court on such cases as *Continental Bank v. Chicago, R.I. & P. Ry.*, 294 U.S. 648 (1935), and *Reconstruction Finance Corp. v. Denver & R.G.W.R.R.*, 328 U.S. 495 (1946), in arguing that the Act's failure to provide for erosion is constitutional. That reliance is wholly

misplaced.[10] In those cases it was unquestioned that the respective railroads were viable; indeed they had been earning net operating income during the reorganization proceedings, and no one contended that the fair market value [11] of the properties was greater than their going-concern value, nor did anyone propose liquidation as in the best interests of the estate or even of any particular creditor. The problem in those early reorganizations, as is well known, was the scaling down of debt so that the level of fixed charges would be manageable in terms of the level of earnings; none of them presented problems or issues remotely comparable to those involved here.

And, as we have seen, the *New Haven* litigation clearly establishes that, while some erosion is tolerable in certain circumstances, there is a point beyond which continued loss operations become unconstitutional if for the account of the estate. Whether that point has yet been reached with respect to the Penn Central, or when it will be reached, is not necessary to determine in this proceeding. But since no one can deny the possibility of unconstitutional erosion, a determination that any such erosion is not for the account of the estate but is compensable under the Tucker Act is essential to make it possible to hold the Act — which requires continuing erosion — constitutional.

The Government will presumably argue, as it has argued in the Special Court, that the Act provides sufficient

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[10] The issue in *Continental Bank*, which involved the customary Section 77 injunction against sales of collateral, arose at the very outset of the reorganization proceedin, and the injunction could "at any time be dissolved upon application and proper notice and showing," 294 U.S. at 685. In *Denver*, the issue was whether erosion that had already occurred, apparently without objection, should be borne by senior or junior creditors. The Court simply applied the strict-priority rule.

[11] See pp. 54-55, *infra*.

assurance of an ultimately successful reorganization, through the Conrail device, as to justify some continued erosion at the expense of the estate and its creditors. There are at least three answers. First, we think that, once the owners of the railroad's estate squarely raise the issue and seek to exercise their rights, it is highly questionable whether continued loss operations may be required solely in the public interest without some form of compensation for the consequent erosion of their property. See *New Haven Inclusion Cases*, 399 U.S. at 492-93.[12] Second, the Act provides no assurance of any successful reorganization at all, let alone within any definite time limit. (See p. 41, *infra*, n. 13.) Third, an analysis of the provisions and objectives of the Act with respect to Conrail (pp. 57-61, *infra*) makes it dubious in the extreme that Conrail will ever produce income, let alone that it will be sufficiently profitable to pay dividends giving its stockholders — chiefly the present Penn Central creditors — any return remotely comparable to the fair value of the properties they would be forced to surrender. For these reasons, there is no constitutional basis on which loss operations can be required indefinitely at the expense of the estate.

[12] In *New Haven*, moreover, the estate was guaranteed the value of its properties as of December 31, 1966, a date prior to the first objection by any creditor. *New Haven Inclusion Cases*, 399 U.S. at 492. Thus the estate was wholly protected from any physical erosion caused by deterioration of its properties.

B. The Act, While Requiring Continuance of Deficit Rail Operations, Contains No Provisions Compensating the Penn Central Estate for the Erosion Incurred Thereby.

Absent a remedy in the Court of Claims, the Act fatally infringes the constitutional rules discussed above in requiring continued rail operations for an indefinite time [13] without any provision compensating the estates in reorganization for the resulting erosion.

The Government has argued in the Special Court that nothing in the Act precludes that court, in determining the compensation to be paid the bankrupt estates under Section 303(c) of the Act, from making an allowance for any unconstitutional erosion that may have been suffered. That the Special Court could make such an award is by no means clear from the text of Section 303(c), which is at least equally compatible with the construction that the court may allow only compensation for the value of the properties at the time of their conveyance.[14] But even if the Govern-

[13] While time limits are specified in the Act for the steps up to and including the mandatory transfer of properties *if* either House of Congress does not disapprove the final system plan, there are no limitations whatever on how many plans Congress may disapprove, and no time limitation on USRA in preparing plans subsequent to disapproval of the first such plan. Section 208. Thus, if either House disapproves any aspect of the first plan submitted, the purportedly tight time schedule established by the Act collapses altogether, and the period for which Section 305(f) requires loss operations to continue is without limit.

[14] The legislative history is clear: "the value of the consideration must equal the fair and equitable value of the rail properties as of the date of the conveyance," and "the court is required to return any excess in the amount of the consideration." Regional Rail Reorganization Act of 1973, H.R. Rep. No. 93-260 of the Committee on Interstate and Foreign Commerce, p. 53 (93d Cong., 1st Sess. 1973).

ment is right, the Special Court would be powerless to grant effective and adequate compensation for erosion, just as it would be powerless to award effective compensation for the value of the properties. As shown at pp. 56-61, *infra*, the Special Court is severely limited in the types and amount of compensation it can award, including, as a last resort, a judgment against Conrail which may well be worthless. Since the Special Court will have no power to enter a judgment against the United States, it is apparent that it will be powerless to award just compensation under the Fifth Amendment for any taking of property that may occur by virtue of the Act, whether with respect to interim erosion or otherwise.

The Act affords no prospect for compensating the estate for the erosion which it has already suffered, and only conjecturally can it mitigate even the continuing physical erosion of those properties inclusion of which in the final system plan can reasonably be anticipated. Section 213 of the Act provides authorization of $85 million to be made available to the Secretary of the Department of Transportation for payment to trustees of railroads in reorganization of "such sums as are necessary for the continued provision of essential transportation services by such railroads." These funds, supplied to the Penn Central Trustees thus far in the amount of $20.6 million (J.D.S. Items 22, 31),[15] represented emergency assistance to keep Penn Central in operation on a day-to-day basis, not to stem erosion.[16] In any event, the amount authorized is obviously

[15]The second grant, approved April 30, 1974 (J.D.S. Item 31), was in effect a "drawing account" for $18 million. The Trustees actually drew down $9.8 million.

[16]The Federal Railroad Administrator, to whom authority to make grants under Section 213 has been delegated by the Secretary of Transportation (39 F.R. 8919), in response to a request for a Section 213 (continued)

inadequate, even if the full amount had been appropriated, which it has not.[17]

Section 215 authorizes the Secretary, with the approval of USRA, to enter into agreements with railroads in reorganization for the acquisition, improvement or maintenance of property which will be included in the final system plan, to be financed by obligations of USRA in a maximum amount of $150 million, which must be assumed by Conrail when it comes into existence. Any values which are created by the use of these funds are to be deducted from the purchase price when the properties are conveyed to Conrail. These funds, depending on how they were used, could possibly arrest some of the physical erosion of the estate. However, they clearly are not available to compensate the estate for the interim financial erosion which has occurred and which is continuing.[18] It should be added that, although the final grant agreement under Section 213

[16] (continued)
grant from the trustee of the Central Railroad of New Jersey "to protect against further erosion of the estate," advised the trustee on May 10, 1974: "In our opinion, the granting of financial assistance to protect against further erosion of the estate, is not in accordance with the purpose for which funds under Section 213 of the Act have been appropriated." (A copy of the letter is attached to this brief as Annex A.) Also, the conference report on the appropriation under Section 213 (H. Rep. No. 93-1070, 93d Cong., 2d Sess. p. 20) stated: "The purpose of the cash assistance is to keep the bankrupt lines running until the final plan of the new system is drawn up and implemented."

[17]The Foreign Assistance and Related Programs Appropriation Act of 1974 (P.L. 93-240) appropriated $35 million. The Second Supplemental Appropriation Act of 1974 (P.L. 93-305) appropriated an additional $39.8 million, for a total which is $10.2 million less than the amount authorized.

[18]Capital improvements can ultimately affect losses by reducing expenses, but the lead time in making such improvements is such that any benefits would be of little or no immediate significance.

required Penn Central to submit proposals for the use of Section 215 funds by May 15, 1974 (Par. 1(h), Item 15, J.D.S.), which was done, no Section 215 funds have yet been made available (by issuance and sale of USRA obligations), and no proposals under Section 215 for Penn Central properties have been approved.

The Act, moreover, forbids, for all practical purposes, any mitigation of the interim erosion by way of terminating unprofitable operations. Congress made clear its intention in effect to freeze the level of operations existing on January 2, 1974, in order to give USRA the maximum amount of choice as to what would be in the final system plan. When it made grant funds available by Section 213 to keep the bankrupt railroads running during the planning period, it decreed that "recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act." Again, in Section 304(f), it provided that after January 2, 1974,

> "no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association [USRA] and unless no affected State or local or regional transportation authority reasonably opposes such action."

The Association has, thus far at least, not authorized any abandonments, and indeed does not appear to have established any policies to guide disposition of abandonment requests. Items 64 and 65 of the Joint Documentary Submission are, respectively, the requests for approvals of abandonments which the Penn Central Trustees have submitted to USRA, and the USRA response that it was, in effect, not yet ready to deal with them.

There are, moreover, questions of interpretation of the Act which have not yet been resolved. The apparent grant of authority to USRA to authorize abandonments under Section 304(f) may supersede the authority of the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act, or it may require that both the Interstate Commerce Act and Section 304(f) be complied with. Since USRA has not acted on any applications, the issue has not yet been litigated, as no doubt it will be.

As is apparent from what has already been said, USRA has given no indication of the standards or policies it will apply in exercising its authority under Section 304(f). State, local and congressional sources have been adamant in the view that USRA should seldom, if ever, authorize any interim abandonments. When the second grant agreement under Section 213 between the Trustees and the Federal Railroad Administrator was shown to contain a provision requiring the Trustees to apply to USRA for permission to abandon a line whenever requested to do so by the Secretary of Transportation, it was vigorously criticized by Congressman Adams, who had been an active sponsor of the Act, as "completely contrary to the intent of Congress in adopting Sections 213, 215 and 304(f) of the Act." He added: ". . . our intention was to preserve the status quo or rail service in the Northeast during this critical time and to allow full public comment on abandonment procedures.[19] A similar criticism of the provision in the grant agreement was made by Public Counsel of the Interstate Commerce Commission (Cong. Rec., May 14, 1974, p. S 7958).

Prior to the Act, but subsequent to the filing of the petition under Section 77, the Penn Central Trustees had actively pursued a program of abandonments of un-

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[19] A copy of Mr. Adams' letter is attached to this brief as Annex B.

profitable lines, which they regarded as one of the four essential requisites of a successful reorganization. See *e.g.*, Trustees' Report of July 1, 1972 (J.D.S. Item 6). From June 21, 1970, to the end of 1973, the Interstate Commerce Commission had approved the abandonment of 1,511 miles of line.[20] On January 3, 1974 — the date of enactment of the Act — applications to abandon 2,222 additional miles were pending before the Commission. There has been no action on any application since that date.[21]

The most serious erosion problem created by the Act is not the complete standstill it has imposed, at least so far, on applications for abandonment of particular rail lines whose unprofitability is undoubted. No one contends that Penn Central could be made profitable solely by abandonment of lightly used (in many cases unused) branch lines. The problem of viability is, rather, a problem of the Penn Central system as a whole; and the infirmity of the Act, absent a Tucker Act remedy, is that it requires continuation of that system's operations during a lengthy, indeterminate planning process without any assurance either of ultimate viability or of compensation to the estate for the erosion suffered in the meantime. If such compensation is not assured by a Tucker Act remedy, continuation of rail operations on the present basis cannot be sustained.

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[20]Application to abandon some 90 miles were pending at the Interstate Commerce Commission on June 20, 1970.

[21]It would be inaccurate to attribute the lack of ICC activity during the past seven months entirely to Section 304(f). Since 1973 the Commission has been engaged in litigation concerning the procedures it must follow under the National Environmental Policy Act (42 U.S.C. § 4331). See *Harlem Valley Transportation Ass'n v. Stafford*, No. 73-2496, 2d Cir. June 18, 1974. That problem has recently been resolved, and the Commission must now confront the question of what authority it has in the light of Section 304(f).

The Government will doubtless argue that the Act provides sufficient prospects for a successful reorganization of Penn Central through conveyance of rail properties to Conrail, within a sufficiently short period of time, as to warrant a requirement that the Penn Central estate bear the burden of continuing erosion until the process can be completed. For the reasons already indicated, this argument represents a misinterpretation of the *New Haven* litigation and other applicable law. An additional defect in the argument is that, for the reasons set forth at pp. 57-61, *infra*, it is impossible to conclude at the present time that reorganization through the Conrail device has any reasonable prospects of success or viability. Conrail cannot presently be said to provide any prospect of a successful reorganization even remotely comparable to the assured inclusion in the Penn Central system which was held to warrant, for a time, continued New Haven loss operations. Congress may never permit a Conrail system to come into existence at all; if it does permit it, the system may be hopelessly unviable from the outset; even if it is operationally viable, there is no assurance that the estates will be adequately compensated for the properties they would convey to it. Such shadowy, tentative and amorphous prospects can furnish no justification whatever for an indefinite compelled continuation of Penn Central rail service, which will result in the simple confiscation of the property of Penn Central and its creditors.

III.

THE CONSTITUTIONAL ADEQUACY OF THE ACT'S PROVISIONS FOR COMPENSATION FOR THE PERMANENT TAKING CONTEMPLATED THEREBY IS RIPE FOR DECISION.

The majority of the court below declined, on the ground of prematurity, to decide the question whether the Act infringes the Fifth Amendment on the ground that, absent a Tucker Act remedy, the Act does not assure to the Penn Central estate the just compensation which the Constitution requires for the ultimate mandatory conveyance of its property to Conrail. The majority held that a decision on this issue was premature because three "contingencies" would have to be satisfied before the conveyance could take place: (1) the "180-day" decision with respect to Penn Central; (2) approval of the final system plan by Congress, and (3) an order by the Special Court directing that the conveyance take place (J.A. p. 24). We think it clear, as did Judge Fullam (J.A. pp. 57-60), that none of these "contingencies" makes decision of the issue presently premature.

(1) The 180-Day Decision

The 180-day decision has been made since the decision of the court below was entered. On July 1, 1974, the Penn Central Reorganization Court, after hearing pursuant to Section 207(b), found that the process of the Act was not fair and equitable to the Penn Central estate (J.A. p. 152). Essentially, the decision rested on the same constitutional objections to the adequacy of the compensation provided by the Act which are presented by the present cases before this Court. The issues dealt with in the Reorganization Court's opinion — erosion, assurance that ultimate compensation will be adequate, and the Tucker Act remedy — are all squarely before this Court in the present litigation.

The Reorganization Court's 180-day decision is now on appeal to the Special Court. The same issues are all presented there. The Special Court's decision, which is not appealable (Section 209(b)), will either irrevocably commit Penn Central to reorganizing under the Act or will irrevocably withdraw Penn Central from operation of the Act. For this Court to decline decision of the ultimate-compensation issue would mean that the Special Court's crucial decision as to whether or not Penn Central will reorganize under the Act will necessarily be made without any authoritative decision by this Court of some of the critical constitutional questions which all parties agree must determine the Special Court's disposition.

For example, if the Special Court agrees with the Reorganization Court that the Act fails to provide the assurance of just compensation, and that no Tucker Act remedy is available, then the Penn Central will irrevocably be denied reorganization under the Act, even though the Special Court may be wrong. Unquestionably, there is a vital public interest in Penn Central's reorganizing under the Act if that is constitutionally permissible. The Act itself affirms (Section 207(b)) "the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act." For this Court now to defer decision would mean that this vital public interest might be wholly frustrated because of an *erroneous* determination by a lower court that a remedy which saves the constitutionality of the Act does not exist.

Conversely, if the Special Court holds that a Tucker Act remedy is available and that it saves the constitutionality of the Act, and therefore irrevocably commits the Penn Central to reorganization under the Act, it is possible that years later the Court of Claims or this Court — which of course would not be bound by a Special Court decision concerning Court of Claims jurisdiction — might determine that the

Special Court was wrong on that point and that no Tucker Act remedy is available. It would then be discovered that the Penn Central estate had been unconstitutionally deprived of its property — but the deed would have been irrevocably done long previously.

Thus there is fully satisfied here the requirement "that federal judicial power is to be exercised to strike down legislation . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe v. Ullman*, 367 U.S. 497, 503-04 (1961). The Penn Central Trustees, whose interest is to reorganize under the Act if an adequate Tucker Act remedy exists, are threatened with a Special Court decision irrevocably excluding Penn Central from the Act on a ground which we believe erroneous: *i.e.*, that there is no Tucker Act remedy to assure just compensation for a mandatory conveyance of property under the Act. And both the Trustees and the Penn Central creditor parties are faced with an unconstitutional confiscation of their property if the Special Court erroneously determines that the Act is fair and equitable even without a Tucker Act remedy, or if it holds that a Tucker Act remedy exists and on that basis irrevocably orders Penn Central reorganization under the Act, but it is later authoritatively held in other proceedings that a Tucker Act remedy does *not* exist.

Under Section 207(b) of the Act, the Special Court must announce its decision by September 29, 1974, before these cases can be submitted to this Court. Of course, in the unlikely event that the Special Court were to exclude Penn Central from the Act without regard to the constitutional questions before this Court, or without allowing for adjustments in its decision in the light of this Court's subsequent action, the cases here could be mooted. No party in the Special Court is urging such a course of action. The

Penn Central Trustees are urging the Special Court to affirm the Reorganization Court's 180-day decision, with a condition that if this Court subsequently affirms an adequate Tucker Act remedy it will amend its decision accordingly. It surely is to be expected that, whatever the Special Court decides, its order will leave room for modification in the light of this Court's decision. We shall of course promptly inform this Court of the Special Court's action when that occurs.

(2) Congressional "Approval"

The majority below was apparently under the erroneous impression that the Act makes Congressional approval a prerequisite to effectiveness of the final system plan (J.A. pp. 24, 25), and such Congressional approval was one of the three contingencies which the majority held to make consideration of the mandatory-conveyance issue premature. In fact no Congressional approval is required by the Act. As Judge Fullam's opinion pointed out (J.A. p. 57), under Section 208(a) the plan takes effect unless either House of Congress affirmatively acts to express disapproval. If Congress takes no action within 60 days, the plan becomes effective. No case that we know of has ever held that decision of a legal question is premature because that question might be mooted by some subsequent action of Congress.

Moreover, as Judge Fullam also pointed out (J.A. pp. 57-58), even if Congress disapproves a final system plan, USRA is subject to a continuing duty to present revised plans until one becomes effective through the absence of Congressional action to veto it. Thus the clear mandate of the Act is that *a* final system plan will become effective; and, since no one disputes that *any* final system plan under the Act must provide for the mandatory conveyance of Penn Central properties to Conrail, the adequacy-of-

compensation issue is not premature, regardless of whether it is the first plan or a subsequent one which becomes effective.

The majority below might have had a point if the constitutional issue here presented depended in some way on the *content* of the final system plan which eventually becomes effective. But there is no such dependence. Because of the provisions of the Act limiting compensation, *any* final system plan must necessarily fail to provide the assurance of just compensation which is essential, absent a Tucker Act remedy, to make the Act constitutional.

(3) The Mandatory Nature of the Conveyance

The third "contingency" offered by the majority below to avoid decision is the order of the Special Court under Section 303(b)(1) requiring conveyance of Penn Central property to Conrail. The majority may have believed, though it nowhere stated, that the Special Court would have discretion to refuse to order the conveyance if it believed there was some problem with the adequacy of the consideration. We think it quite clear, as did Judge Fullam (J.A. p. 58), that the Special Court's action under Section 303(b)(1) is mandatory and ministerial, and thus cannot be regarded as a contingency.

While the Special Court is granted, by Section 209(b), the powers of a district judge in Section 77 proceedings — including those of a reorganization court, which would appear to afford it general equity powers — the Act expressly states that "the special court shall . . . order" the transfer. Although such words are not always given a mandatory meaning when adressed to a court of equity, *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), there are other strong indications in the Act that Congress intended that the Special

Court would be performing, at that stage, no more than a ministerial act. The Act sets up specific, tight time schedules obviously designed to bring Conrail to operating status as quickly as possible. This purpose is emphasized by the last sentence of Section 303(b)(2): "Such conveyance [by the Special Court] shall not be restrained or enjoined by any court." A decision by the Special Court to accomplish what all other courts are forbidden to do by refusing to order the transfer, once the "process" of the Act had reached that point, would not only cause delay, but would leave the whole process up in the air. There is no provision in the Act for appellate review, by this Court or a Court of Appeals, of such a decision of the Special Court; this strongly indicates that ordering the transfer was intended as a ministerial act, since all other initial decisions by the Special Court were made subject to judicial review. Nor is there any provision in the Act by which to revise the final system plan at that stage, as there is if it is initially rejected by Congress (Section 208(b)). Moreover, because the time is so short (10 days), the Special Court would have to act on its own motion or have, at most, a summary proceeding prior to taking any such action.

(If the Special Court could refuse to order the transfer, the erosion problem would become even more aggravated, since the erosion would be incurred without any assurance of "light at the end of the tunnel" in the form of a mandatory transfer for which at least some compensation would be due.)

Even if the Special Court had some discretion in ordering the conveyance — which under the Act it plainly does not have — it is undisputed that its action is not subject to review in this or any other court. If, therefore, the Special Court is to have any guidance from this Court on the constitutional issues which would be before it in the highly unlikely event it determined that it had discretion, that

guidance must come in a decision of the present cases. If that guidance is not given, the same dilemma, desired by no one, would exist as will exist if the Special Court must act now in the absence of a decision here: it would have to include Penn Central under the Act, or alternatively to exclude it, on constitutional grounds on which its opinion might well be wrong, with no opportunity for anyone to find out whether it was wrong or not. Such a result would irretrievably injure the parties, and would do violence to the public interest as well.

IV.

THE ACT'S PROVISIONS REGARDING COMPENSATION FAIL TO ASSURE THAT FIFTH AMENDMENT STANDARDS WILL BE SATISFIED.

The provisions of the Act dealing with the consideration which would be received by the Penn Central estate — absent a Tucker Act remedy — for the rail properties it would be required to transfer to Conrail must be assessed against the body of law which establishes that when properties of a railroad in reorganization are transferred by Government decree to a new owner, free and clear of liens and claims of the former owner, the Fifth Amendment fixes a minimum to the amount of consideration the owners must receive. Indeed, Section 303(c)(1)(B) recognizes that the Constitution sets a minimum in such circumstances. No one denies that a constitutional minimum exists, though there are disagreements as to its definition. But however the constitutional minimum is defined (with one exception, see p. 60, *infra*), it is clear that the Act fails to assure that it will be met.

We believe that the constitutional minimum is the fair market value[22] of the properties in question, free of any

[22]This term is more satisfactory than the often-used "liquidation value," because the latter is sometimes improperly read as recognizing (continued)

obligation of continued railroad use. See *New Haven Inclusion Cases*, 399 U.S. 392, 489-495 (1970); *In re Penn Central Transportation Co.*, 372 F. Supp. 1123 (E.D. Pa. 1974); *New York, N.H. & H.R.R. First Mortgage 4% Bondholders' Committee v. United States*, 305 F. Supp. 1049 (S.D.N.Y. 1969); *In re New York, N.H. & H.R.R.*, 304 F. Supp. 793, 798-804 (D. Conn. 1969); *In re New York, N.H. & H.R.R.*, 289 F. Supp. 451, 454-455, 459-460 (D. Conn. 1968); *New York, N.H. & H.R.R. First Mortgage 4% Bondholders' Committee v. United States*, 289 F. Supp. 418, 440-441 (S.D.N.Y. 1968).

Fair market value is the constitutional minimum because, as these and other cases have established, if a railroad has neither earnings nor the reasonable prospect of earnings, its owners have a constitutional right to withdraw their property from operation by them as a railroad and to realize the value obtainable from its sale. See also *Railroad Comm'n of Texas v. Eastern Texas R.R.*, 264 U.S. 79 (1924); *Bullock v. Railroad Comm'n of Florida*, 254 U.S. 513 (1921); *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396 (1920); *In re Penn Central Transportation Co.* (Columbus Option Appeals), 494 F.2d 270 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L. Week 3633 (U.S. May 8, 1974), No. 73-1672; *In re Central R.R. of New Jersey*, 485 F.2d 208 (3d Cir. 1973); *City of New York, v.*

[22] (continued)
only values for non-rail uses. To the extent that the highest and best values of particular rail properties of the estate may be for continued rail use in the hands of others, the estate is plainly entitled to those values in the event of a per-parcel sale ("liquidation") or a constitutional substitute therefor. This is true whether the value is created by prospective profitability of those properties in the hands of others or by a demand for reasons other than profitability, such as a public-interest need determining offers by public bodies.

United States, 337 F. Supp. 150, 160 (E.D.N.Y. 1972); *Jay Street Connecting R.R. v. United States*, 174 F. Supp. 609, 615 (E.D.N.Y. 1959); *In re Port Authority Trans-Hudson Corp.*, 20 N.Y.2d 457, 285 N.Y. Supp. 2d 24, *cert. denied sub nom. Port Authority Trans-Hudson v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968)

The provisions of the Act fail to assure that the owners of the Penn Central estate will receive the constitutional minimum value of the rail properties which it would be required to convey to Conrail.[23] The Penn Central estate would receive stock and perhaps other securities of Conrail and possibly, if the final system plan so provided, some share of the $500 million of Government-guaranteed obligations of USRA which Conrail can acquire, presumably by mortgaging its properties as security. (It is possible, however, that little or none of the $500 million may be available, since it may be allocated towards compensating non-bankrupt lesssor railroads which are not subject to the Act and whose property may concededly not

[23]Such tentative information as to the value of the Penn Central estate as is presently available is referred to in Items 4 (pp. 11-13), 40 and 58, Joint Documentary Submission (J.D.S.). The studies there treated are in the process of further analysis and refinement. No estimate of the value of the estate is relevant to disposition of the present litigation, because (1) no one knows how much of that estate would be taken by Conrail; (2) no one knows the amount, nature or value of the consideration that will be made available; therefore there is nothing against which to measure the value of whatever properties would be taken. Neither is any such estimate relevant to the erosion question: even if the value of the estate should be found to exceed the sum of all claims against it, the stockholders' equity would be suffering erosion, and their rights with respect to erosion are no less than those of creditors. See, *e.g.*, *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, *supra*.

be taken pursuant to the eminent-domain power without payment in cash or cash equivalent.[24]

It is a fair inference that the Act contemplates, and that the final system plan will provide, that most of the consideration is to be in the form of Conrail common stock. Section 206(i) instructs USRA to "minimize any actual or potential debt burden" on Conrail. But there can be no assurance that any substantial value can be ascribed to Conrail common. Its worth will depend entirely on the earning power prospects of Conrail, which will, in turn, depend on a wide variety of factors, including the many decisions which must be made by USRA in constructing the final system plan and the extent to which those decisions will be acceptable to Congress.

Indeed, the goals which are to be achieved in the final system plan are not easily made compatible. By Section 206(a)(1) the system is to be "financially self-sustaining," yet by Section 206(a)(2) it is also to be "adequate to meet the rail transportation needs and service requirements of the region." By Section 206(a)(5) it is to provide for "retention and promotion of competition in the provision of rail and other transportation services in the region," and by Section 206(a)(8) it is to minimize "job losses and associated increases in unemployment and community benefit costs in areas of the region presently served by rail service." The inherent conflict between the goal of financial self-sufficiency and the other goals is well illustrated by the divergent approaches taken by the Department of Transportation in its Report pursuant to Section 204(a) (J.D.S.

[24]At a pre-trial hearing in the Special Court, counsel for the Government conceded that, in requiring conveyances from non-bankrupt lessor railroads to Conrail, the Government would be exercising eminent domain power.

Item 62) and by the ICC's Rail Services Planning Office in its Report pursuant to Section 205(a)(1) (J.D.S. Item 63). The latter reflects the same public pressure for retention of even unprofitable rail services that will be felt in Congress when that body considers a USRA plan.

In any event, given these disparate criteria, the political bodies which must make the final decisions on Conrail may design a rail system with some prospects for viability — though predictions as to earning power of a to-be-created system are fraught with difficulty [25] — or they may go far in the direction of rendering the system unviable as a profit-making entity in order to meet the demands of communities and industries for continued rail service.[26] Depending on the totality of the choices made by political bodies influenced by non-financial considerations, the equity securities of Conrail may be worth little or nothing.

No one knows, or can even make a responsible guess, as to the size or configuration of the final system which Conrail will acquire. No one knows the extent to which USRA will be required, by the pressures which are so evident in the hearings held by the Rail Planning Office of the ICC,[27] to enlarge the system to a point where its viability will be precarious and its common stock virtually or entirely

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[25] When the Pennsylvania and New York Central railroads were merged in 1968, the courts believed that the merger would produce benefits of more than $80,000,000 annually. *New Haven Inclusion Cases*, 399 U.S. at 400. A little over two years later, Penn Central was in bankruptcy.

[26] That some unprofitable branch lines may be continued by way of the subsidy provisions of Sections 401 and 402 will reduce only slightly the pressure to include them in the Conrail system. The subsidies require local funds, and the Federal support is assured for only two years. Section 402(f).

[27] See the Report of the Office (J.D.S. Item 63), *passim*.

worthless. While there are strong indications that Conrail will not be viable, the assumptions as to the size and configuration of the final system on which that estimate rests may or may not be accurate; no one can tell. Moreover, as the Reorganization Court pointed out (J.A. pp. 137-39), no one knows what standard of valuation will be applied to the rail properties to be acquired by Conrail, which may be decided by the Supreme Court sometime in the future to have been so wide of the mark as (because of the resulting judgment against Conrail) to destroy the assumed viability of Conrail entirely.[28] Similarly, no one knows how USRA will value Conrail's stock, and other securities, or indeed what securities it will authorize. USRA's decision as to what Conrail and USRA securities should be authorized is apparently not subject to any judicial review, since Section 303(c)(2)(B) provides that the Special Court is limited, in its allocation of such securities among the estates in reorganization, to securities "designated in the final system plan."

The Reorganization Court's opinion points up another major uncertainty as to the value of Conrail stock. Both the legislative history of the Act and arguments before that court by Government counsel suggest that USRA may proceed on the assumption that the value of the Conrail common stock — *i.e.*, the capitalized value of its prospective earnings — necessarily and automatically establishes the value of the rail assets conveyed to Conrail. If that is in error, as we believe it is,[29] and this Court ultimately so

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[28] "The heart of . . . a determination [of the validity of a plan of reorganization] is a finding of fact . . . as to the value of the debtor's property." *New Haven Inclusion Cases*, 399 U.S. 392, 428 (1970).

[29] If this position were right, the Special Court would be obliged to award the estate only common stock even if the final system plan had

(continued)

holds, the capital structure and viability prospects assumed in the USRA plan would be no longer appropriate. This view that the constitutional minimum is *automatically* satisfied by Conrail stock is the only basis on which it can be argued that the Act assures satisfaction of the constitutional minimum. For the reasons stated at pp. 34-40 and pp. 54-56, *supra*, we think that view is plainly in error.

Nor is there assurance of adequate consideration to the Penn Central estate in the only remedy available to the Special Court in the event Conrail common stock is substantially or wholly worthless — a judgment against Conrail under Section 303(c)(2)(C). There is no basis upon which to conclude that Conrail could pay the judgment, or even service the debt which it would create. As the Reorganization Court observed (J.A. p. 137): "... obviously, such a judgment would be relatively pointless, serving merely as a further reduction in the value of the common stock."

Similarly an "underwriting plan" to guarantee the value of Conrail stock would add no value whatever to the consideration so long as Conrail itself was the guarantor. No provision of the Act permits a guarantee by USRA or by the credit of the United States, and such a device is explicitly ruled out by the legislative history: "the arrangements ... shall not include any form of Federal guarantee of the value of the [Conrail] stock."[30]

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[29] (continued)
provided for other consideration as well. The Special Court is required by Section 303(c)(1)(B) to make sure that no estate receives more than the constitutional minimum, and it "is required to return any excess in the amount of the consideration." Regional Rail Reorganization Act of 1973, H.R. Report No. 93-620 of the Committee on Interstate and Foreign Commerce, p. 53 (93d Cong. 1st Sess. 1973).

[30] Regional Rail Reorganization Act of 1973, Conference Report, H.R. Rep. No. 93-744, p. 56 (93d Cong. 1st Sess. 1973).

For all these reasons, the conclusion is inescapable that there is nothing within the four corners of the Act which assures the Penn Central estate of the just compensation required by the Constitution for the taking of its properties. If no Tucker Act remedy is available, the Act must fall.

A word is appropriate as to the provision in Section 206(d)(1) that the consideration to be received for the rail properties transferred to Conrail shall also include "the other benefits accruing to such railroad by reason of such transfer." The words "other benefits" must, of course, be construed to be consistent with the rules which determine the extent to which, in a condemnation action, the condemnee may constitutionally be charged with benefits or enhancement of values accruing to him as a direct result of the taking in question. If the words were not so construed, the deduction of "other benefits" from the consideration to be received would violate the principle that it is the courts, not the Congress, which in all cases must determine the measure of just compensation for the taking of property. *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 364-369 (1936); *United States v. New River Collieries*, 262 U.S. 341, 344 (1923); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).[31]

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[31] The Trustees by no means concede that, as the Government parties have heretofore assumed, the payment to labor provided by Title V of the Act will be an "other benefit." That question, of course, need not be decided now. Suffice it that the uncertainty of what "other benefits" may be, and the lack of any record on which a court could estimate either their dollar equivalent or the extent to which they would affect the amount or value of Conrail stock which the Penn Central estate would receive, only add to the uncertainty — the lack of assurance — with which the Courts is confronted.

The Government has contended in the Special Court that the Act is similar to Section 77 in requiring railroad creditors to accept securities, not necessarily of the same type and priority as their previous interests, in an ongoing railroad enterprise, and that such Section 77 plans have frequently been upheld by the courts. But all of the prior cases involved judicial approval of fully worked-out plans for the reorganization of railroads that the record showed were viable, in the sense that they produced and would continue to produce net operating income. None of them involved the courts in irrevocably approving reorganization pursuant to a plan not yet devised and offering no demonstrable prospects, let alone assurance, of viability. Thus in none of the cases on which the Government relies was the *Brooks-Scanlon* doctrine mentioned; it had no application to those situations. Here, by contrast, it is controlling. The Government itself has conceded in its brief to the Special Court (p. 32): "Of course, since the amount of rail property [to be] conveyed cannot be foreseen at this time, it is impossible to make any final judgment as to the adequacy of consideration for that property." In these circumstances, the Court must, before allowing the irrevocable process of the statute to proceed, confront the distinct possibility that the consideration will in fact prove inadequate. And there is nothing in the Act that would cure such an inadequacy if it develops; only a Tucker Act remedy in the Court of Claims can do that.

V.

THE EXISTENCE OF AN ADEQUATE COURT OF CLAIMS REMEDY SAVES THE CONSTITUTIONALITY OF THE ACT.

A. An Adequate Court of Claims Remedy Cures the Fifth Amendment Problem.

We believe that the constitutionality of the Act can be sustained (and its fairness and equity to the Penn Central estate sustained by the Special Court) if the decision of this Court establishes:

> (a) If the market value of the consideration provided under the Act, determined as of the date of payment of that consideration, falls below the just compensation to which the Penn Central estate is constitutionally entitled, the Court of Claims will have jurisdiction over an action for a taking, and must enter a judgment against the United States for any remaining amount owing; the only defense open to the United States in that court will be that the value of the consideration paid under the Act is sufficient in amount to constitute the full just compensation necessary to satisfy the Fifth Amendment; and
>
> (b) If it is determined that, by reason of the Act, Penn Central loss operations for the account of the estate were prolonged past the point of unconstitutionality, the Court of Claims will have jurisdiction to award just compensation to the estate for the taking of property occasioned thereby; the only defense open to the United States in that court

> will be that the erosion caused by Penn Central loss operations did not become unconstitutional in amount before the date of conveyance, or that the Special Court has taken account of such erosion and awarded consideration to the estate of sufficient value to satisfy the Fifth Amendment.

In other words, a bare holding that the jurisdiction of the Court of Claims was not repealed by the Act would be insufficient if the United States were to retain defenses which, if successful, could frustrate a Tucker Act remedy as ensuring just compensation to the estate. Merely as one example, we think it clear that the Government must be precluded from arguing in a Court of Claims action that erosion is not compensable on the ground that the Trustees or the Reorganization Court somehow consented to the continuation of rail operations for the account of the estate, and that no taking occurred for that reason. Surely the estate may not thus be penalized because its custodians are making every reasonable effort to accommodate themselves to the statute rather than, for example, seeking immediate liquidation.

Since it would be hazardous, if not impossible, to try to imagine every conceivable defense to a Court of Claims action which ingenious Government counsel might formulate, the only way to ensure that the estate will receive just compensation is to preclude all defenses other than those outlined above. The following remarks by counsel for all the Government parties to the court below (J.D.S. Item 64, pp. 143-44) indicate that the Government agrees with this position:

> "Now, Mr. Horsky [counsel for the Penn Central Trustees] also said, I think, that he felt that as to a permanent taking or any

> taking he thought the only question that should be before the Court of Claims is whether the values that had been paid over were constitutionally inadequate and that if they were, it was simply a matter of money to be awarded then.
>
> "We would agree to that as to the permanent taking, but as to any claim for an interim taking, we would say the court would then have two problems before it, the first of which would be whether the time all the creditors and stockholders were required to wait exceeded the permissible limits of erosion, whether there was any taking at all, in other words, and in the New Haven case when Judge Anderson finally set an erosion limit, the only one I think we are familiar with to date, it was as of a date seven years after the New Haven reorganization had begun, and this reorganization I think is just becoming — Judge Fullam will know exactly — four years old.
>
> "So there would be two questions for the Court of Claims to decide there. First, has the interim erosion passed the point of impermissibility under the Constitution at all, and, second, if so, what was the amount?"

If a fully adequate Court of Claims remedy is thus established, the question remains whether the Act nonetheless infringes the Fifth Amendment because the partial consideration there provided for is to be paid in forms (*e.g.*, Conrail securites) other than cash. Even if a Court of Claims remedy is available for the deficiency, which of

course will be owed in cash, arguably the form of compensation specified in the Act is constitutionally inadequate because of the rule that when property is taken for a public purpose the Constitution requires payment in cash or cash equivalent. *E.g., Almota Farmers Elev. & Whse. Co. v. United States,* 409 U.S. 470 (1973); *United States v. Reynolds,* 397 U.S. 14 (1970); *Olsen v. United States,* 292 U.S. 246 (1934); *Vanhorne's Lessee v. Dorrance,* 2 U.S. (2 Dall.) 304 (1795). This problem concerned the Reorganization Court (J.S. pp. 146-47).

We think that concern would be fully justified if the Conrail securities and other consideration tendered under the Act were valued on the basis of some alleged "intrinsic" value unrelated to their market value on the date of their receipt by the estates in reorganization. The estates would then be receiving, as partial compensation for a taking of property, nothing resembling cash or cash equivalent, but merely speculative securities the alleged value of which could be realized only after many years and only if the Special Court's prognosis of the viability of Conrail proved accurate. It was a similar problem in the New Haven reorganization which led Judge Anderson to devise an "underwriting plan" to ensure that the New Haven estate in fact received the cash equivalent of the "intrinsic" value attributed to the Penn Central stock it was acquiring. *In re New York, N.H. & H.R.R.,* 304 F. Supp. 793, 808-10, 304 F. Supp. 1136 (D. Conn. 1969). That device was specifically approved by this Court, but for the unforeseen Penn Central bankruptcy, in *New Haven Inclusion Cases,* 399 U.S. 392, 483-89 (1970): and the Court rejected the lower court's findings as to "intrinsic value," since "the fairness and equity that are the essence of a § 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value." 399 U.S. at 488.

No effective underwriting plan is permissible under the 1973 Act as presently written.[32] We believe it follows that, pursuant to the constitutional rule with respect to cash or cash equivalent, the Special Court will be obliged to ignore any alleged "intrinsic" value and, instead, to value the securities tendered to the estates in reorganization at no more than their cash market value on the date they are received by those estates.

Even if the Act were held to preclude such a method of valuation by the Special Court — and we know of no reason why that should be held — then a Tucker Act remedy is adequate if the Court of Claims will be able to ensure constitutionally adequate treatment to the Penn Central estate. We believe it will be so able. If and when the Court of Claims is asked to award a deficiency judgment against the United States, on the ground that the maximum consideration which the Special Court could award was constitutionally inadequate, the Court of Claims could and must, consistently with the Constitution, enter judgment for that amount which remains constitutionally owing. We think that this Court can meet the argument that the Act is unconstitutional because it fails to ensure the cash or cash equivalent which the Constitution requires only by holding that the partial consideration to be received under the Act must be valued at no more than its cash value on the date of its receipt.

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[32] See p. 60, *supra.*

B. With the Exception of One Readily Severable Provision, the Act Is Not in Violation of the "Uniformity" Requirement of Article I, Section 8, Clause 4 of the Constitution.

The court below correctly held that, with one exception, the provisions of the Act do not infringe the constitutional requirement that laws on bankruptcy must be uniform throughout the United States. Article I, Section 8, Clause 4.

The argument to the contrary rests on the statement in *Hanover National Bank v. Moyses*, 186 U.S. 181, 188 (1902) that the uniformity requirement "is geographic and not personal." There are two answers.

One is the answer given by the majority of the court below (J.A. 27, 61-64): that since the principal provisions of the Act which depend on the bankruptcy power for their validity are repetitive of similar provisions in existing, valid laws — albeit that some of those powers are to be exercised by the Special Court rather than the Reorganization Court — the Act as a whole can be upheld as an exercise of the broad powers of Congress under the Commerce Clause. See, *e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 303-304 (1964); *Maryland v. Wirtz*, 392 U.S. 183, 190 (1968). That the legislation emerged from the Commerce committees in both the House and the Senate reflects the fact that the underlying concern of the Act, as reflected in its title, is the regulation of interstate commerce.

The second answer is that the Act, even viewed as no more than an exercise of the bankruptcy power, is a legitimate classification of debtors. No decision by this Court has ever held that an act of Congress violated the

uniformity requirement,[33] and many attacks made upon earlier bankruptcy laws have been rejected in circumstances similar to those here involved. See, *e.g.*, *In re Baltimore & Ohio R.R.*, 29 F. Supp. 608 (D. Md. 1939), *cert. denied*, 309 U.S. 654 (1940); *Campbell v. Alleghany Corp.*, 75 F.2d 947, 951 (4th Cir. 1934), *cert. denied*, 296 U.S. 581 (1935); *Leidigh Carriage Co. v. Stengel*, 95 F. 637, 646-48 (6th Cir. 1899); *In re New York, N.H. & H.R.R.*, 16 F. Supp. 504, 512-13 (D. Conn. 1936); *In re California P. R.R.*, 4 F. Cas. 1060 (No. 2,315) (D. Cal. 1874). Indeed, as Justice Frankfurter stated in his concurring opinion in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 172 (1946), the uniformity requirement is satisfied "when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the state in which the bankruptcy court sits." No one asserts here that that standard is not met by the Act.

While these answers suffice to dispose of the general non-uniformity challenge, there is one provision of the Act which was properly held invalid on this ground by the court below (J.A. pp. 27, 64-65) — the requirement of Section 207(b) that, if the process of the Act is found to be not fair and equitable, the reorganization court "shall dismiss the reorganization proceeding."

This provision is in no sense an exercise of the commerce power. It effects a partial repeal of Section 77, since it would prevent continued use of that section to effect an appropriate reorganization of a railroad to which it applied. The issue is not rendered moot because Penn Central is not

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[33] The only such decision in a lower court — *United States Nat'l Bank v. Pamp*, 83 F.2d 493 (8th Cir. 1936) — was expressly rejected in *Wright v. Vinton Branch*, 300 U.S. 440, 463 and n. 7 (1937).

reorganizable on an income basis within a reasonable time, as determined in the 120-day decision. Reorganization on an income basis is by no means the only type of reorganization which can be effected under Section 77. *Cf. New Haven Inclusion Cases*, 399 U.S. 392 (1970). The partial repeal of Section 77, however, applies only to railroads in one part of the United States, defined in Section 102(13) of the Act.

Nor can this provision be sustained on the ground suggested by Judge Aldisert (J.A. 27-29) for rejection of the "uniformity" attack on the statute generally: that the plaintiffs in these actions are Penn Central creditors, and that the Act "is geographically uniform with respect to creditors' claims." The dismissal of the Section 77 proceeding required by Section 207(b) would substantially affect all Penn Central creditors by making their rights and remedies quite different from those of creditors of railroads identically situated except for their geographic location. In any event, Judge Aldisert recognizes that a railroad inside or outside the region would have standing to challenge this provision; and the Penn Central Trustees — representing the railroad and all interests in its estate — do challenge it.

The invalidity of this section, however, does not effect the validity of the Act as a whole. Indeed, it is difficult to understand why the provision was included, except perhaps for an *in terrorem* effect. The separability provision of the Act (Section 604) applies.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the Regional Rail Reorganization Act held constitutional in all respects except for the last nine words of the third sentence of Section 207(b), which should be held void as repugnant to Article I, Section 8, Clause 4 of the Constitution.

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August 23, 1974

APPENDIX

Constitutional and Statutory Provisions

Constitution of the United States, Article I, Section 8, Clause 4:

> "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States;".

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Tucker Act, 28 U.S.C. § 1491 (1970):

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for

liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

"Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority."

ANNEX A

(Seal) **DEPARTMENT OF TRANSPORTATION**
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D.C. 20590

OFFICE OF
THE ADMINISTRATOR

May 10, 1974

Mr. R.D. Timpany
Trustee, The Central Railroad
Company of New Jersey
1100 Raymond Boulevard
Newark, New Jersey 07102

Dear Mr. Timpany:

This is in response to your application dated April 18, 1974, for emergency assistance pursuant to Section 213 of the Regional Rail Reorganization Act of 1973 and Part 253 of Title 49 of the Code of Federal Regulations.

You have requested $10,357,000 in assistance, to be made available as follows:

April 30, 1974	$1,778,000
July 1, 1974	1,659,000
October 1, 1974	1,759,000
January 1, 1975	2,730,000
April 1, 1975	2,431,000
	$10,357,000

You contend that the amount requested in your application is necessary to protect against further erosion of the estate and is intended on this basis to cover estimated net income losses for the period April 1974 - June 1975. In your letter of April 30, 1974, you further advise that as a result of your continuing review of operations, the previously forecast net income loss of $1,778,000 for the second quarter of 1974

should be increased to $1,981,000 to reflect an updating of cost and revenue components. You also advise in that letter that previously forecast month-end cash balances should be reduced, in part due to a change in practice by the State of New Jersey, resulting in slower payment of monthly supplemental subsidy bills rendered to the State.

Based on our review of your application, and pursuant to the purposes and intent of the Act, I am prepared to enter into a definitive agreement for a total of $2.0 million in emergency assistance in accordance with the draft grant agreement and terms and conditions which are attached.

As the draft agreement and terms and conditions more explicitly provide, the assistance would be furnished to meet specific payments for (a) wages and salaries, (b) fuel costs, and (c) utilities expenses which are necessary for the continued provision of essential services by the Central Railroad Company of New Jersey. Funds to meet such payments would be deposited in a separate account from time to time, based on a certification by you that grant funds in a specified amount are essential to avoid an imminent risk of termination of rail services.

The draft terms and conditions also include a provision for a program of assistance under Section 215. Based on the preliminary discussions we have had with respect to a program for the rehabilitation of the terminal area under Section 215, it would appear that the chances of realizing an acceptable return on investment in the terminal area, plus some possible early cash generation, would be favorable. It would thus be useful to have your specific proposal for the rehabilitation of the terminal area for review as soon as possible.

In reviewing your application and subsequent revision, we have taken three major exceptions:

1. In our opinion, the granting of financial assistance to protect against further erosion of the estate, is not in accordance with the purpose for which the funds under § 213 of the Act have been appropriated. Accordingly, your application for assistance specifically on this basis is denied. However, the information supplied in your application indicates that you will imminently require emergency cash assistance to keep essential services going, and it is on this basis that the assistance is being made available pursuant to the Act.

2. Further, it is our opinion that in the absence of a Court order, the payment of retroactive wages, or the payment of any retroactive debt, would not be a proper item to be covered by assistance under Section 213. Therefore, we will not include in any assistance provided, amounts to cover retroactive payment, as you propose, of the 4 percent wage increase which became effective nationally on January 1, 1974. It is our understanding that you have made no commitment, nor entered into any agreement to make these retroactive payments.

3. With respect to the payment of supplemental subsidy bills by the State, we have advised the Office of the Commissioner of Transportation that, in our opinion, Section 213 does not contemplate the granting of emergency assistance to cover slowed payment of such bills by the State. Indeed, in the formulation and adoption of emergency assistance provisions, it was assumed that then-existing financial assistance would be maintained. We trust that a way will be found by the State and yourself to promptly settle this issue. In any event, we suggest that the negotiations with the responsible State authorities proceed on the basis that the appropriations under the Act to assure continuation of essential services did not contemplate the underwriting

of such portions of cash shortfalls as result from slowed payments of amounts owed under otherwise binding agreements.

It is our understanding that your cash situation may be extremely critical as early as May 22, 1974. We are prepared to proceed expeditiously to execute a definitive agreement upon receipt of advice from you with respect to this offer.

Sincerely,

/s/ John W. Ingram
JOHN W. INGRAM
Administrator

APPENDIX B

Rec'd. April 30, 1974

April 26, 1974

Honorable John W. Barnum
Under Secretary
Department of Transportation
Washington, D.C. 20590

Dear John:

I was very concerned to read in the *Washington Star* of April 25th an article which indicated that both you and John Ingram would condition operating grants to the Penn Central on a requirement that applications be made to the United States Railway Association (USRA) for abandonment of lines which you deemed to be "hopelessly uneconomic."

The purpose of this letter is to emphasize to you that such an endeavor by DOT and the Trustees of the Penn Central would be completely contrary to the intent of Congress in adopting sections 213, 215 and sections 304(f) of the Regional Rail Reorganization Act.

In an earlier letter to you dated March 15, 1974, regarding the proposed abandonment by the Erie-Lackawanna of a commuter service to Cleveland, I outlined my understanding of Congressional intent regarding abandonments of rail lines or services during the planning period created by the Regional Rail Reorganization Act.

In summary, what I said then, and repeat to you now, is that our intention was to preserve the status quo of rail service in the Northeast during that critical time and to allow full public comment on abandonment proposals. The purpose of this procedure was twofold: first, to allow careful study of the structure of rail service in the Northeast and,

secondarily, to allay public fears regarding wholesale abandonments of rail service. It seems to me that piecemeal abandonments of rail service, such as the *Star* article suggests that you wish, will only arouse public concern. More significantly, they will undermine the very careful process of study and public review of rail service which the Congress created in the Regional Rail Reorganization Act.

The carrying out of the purpose of the Rail Reorganization Act will require the closest cooperation between the Executive and the Legislative branches of government. Ultimately, both House of Congress must approve the final system plan for rail service designed by USRA. In the interim, the Congress must approve the appropriations necessary to carry out the purposes of the Act. Therefore, it seems to me that DOT should give the strictest adherence to Congressional intent in administering the first stages of the lengthy planning process which the Act sets forth. To encourage USRA to allow a series of rail abandonments during the planning period would be both harmful to cooperation between Congress and the DOT, and contrary to the intention of the Act.

I would appreciate receiving from the Department a prompt answer, in writing, as to how you intend to administer the operating grant provisions of section 213 of the Act and how you intend to advise USRA on its policy towards abandonment applications, which it may permit under section 304(f).

Yours very truly,

BROCK ADAMS, M.C.

BA:we

cc: Honorable Warren Magnuson
Honorable Harley O. Staggers
Honorable Richard Shoup
Honorable Dan Kuykendall
Edward Jordan, President
USRA
Mr. Robert Blanchette, Trustee
Penn Central

ANNEX C

Extracts from Proposed Amendments To Senate Commerce Committee Working Paper No. 1.

(transmitted with Secretary Brinegar's letter of Nov. 14, 1973)

P. 46, delete everything on line 12 down through the end of line 10 on p. 50 and substitute the following:

"PROCEEDINGS BEFORE THE SPECIAL COURT

"SEC. 303. (a) APPROVAL OF TRANSFERS UNDER PLAN — As soon as is possible after submission of the final system plan to it, the special court, after hearings, shall decide whether or not to approve the transfers of rail properties and the compensation therefor provided for in the final system plan. In making that decision with respect to each railroad in reorganization, the court shall consider—

(1) whether the transfers are fair and equitable to the debtor's estate; and

(2) the interest of the public in the continuation of rail service over the rail properties proposed for transfer under the final system plan.

If the court finds that it cannot approve any of the transfers provided for in the final system plan because the common stock of the Corporation has not been fairly allocated among the railroads in reorganization transferring rail properties to the Corporation, it shall reallocate the stock in a manner which is fair and equitable. If the court finds that a transfer of rail properties of a railroad in reorganization for common stock of the Corporation would not be fair and equitable to the estate of a railroad in reorganization even

with the stock fairly allocated, it shall amend the final system plan to provide for the transfer to that railroad in reorganization, in addition to its allocated amount of the common stock of the Corporation, obligations of the Association in an amount which, together with the stock, make the transaction fair and equitable to the estate of that railroad. If the court finds that a transfer of rail properties of a railroad in reorganization to a profitable railroad would not be fair and equitable compensation, it shall determine what fair and equitable compensation would be and order that such compensation be paid. If there is no way that the court can make a finding that the proposed transfers of rail properties from a railroad in reorganization to the Corporation are fair and equitable to the estate of a railroad in reorganization, then the court shall disapprove the final system plan with respect to that railroad and remand the case to its reorganization court for further proceedings under section 77 of the Bankruptcy Act. If the court approves the final system plan with respect to a railroad in reorganization, it shall order the parties to make the conveyances as provided for in the final system plan, as it may have been amended by the court. Proceedings under this section shall take precedence over all other matters assigned to the judges of the special court, shall be assigned for hearings at the earliest practicable date and shall be expedited in every way possible.

"(b) APPEALS— a finding or determination entered pursuant to subsection (a) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, that such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall grant the highest priority to the determination

of any such appeals. Notwithstanding the filing of an appeal under this subsection, the special court may refuse to stay the execution of its orders issued under subsection (a) of this section.

"(c) COURT REVIEW OF ACTIONS— Except as provided in section 209(a) of this Act and in this section, action or inaction under this Act of the Secretary, the Commission, the Association or any director, member, officer, committee, or subordinate unit of any of them, shall not be reviewable in any court."

CERTIFICATE OF SERVICE

I hereby certify that I have this 23d day of August, 1974, caused three (3) copies of the foregoing Brief to be mailed first-class, postage prepaid to:

The Honorable Robert H. Bork
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